

IN THE ARBITRATION UNDER CHAPTER 11
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND UNDER THE UNCITRAL ARBITRATION RULES
BETWEEN

- - - - -	-x	:
CANFOR CORPORATION,	:	:
Claimant/Investor,	:	:
and	:	:
UNITED STATES OF AMERICA,	:	:
Respondent/Party.	:	:
- - - - -	-x	Volume 1

Tuesday, December 7, 2004

The World Bank
701 18th Street, N.W.
"J" Building
Assembly Hall B1-080
Washington, D.C.

The hearing in the above-entitled matter
came on, pursuant to notice, at 9:18 a.m. before:

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PROF. JOSEPH WEILER, Arbitrator

MR. CONRAD HARPER, Arbitrator

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1 P R O C E E D I N G S

2 PRESIDENT GAILLARD: Good morning, ladies
3 and gentlemen. I open the hearing in the
4 arbitration between Canfor Corporation and the
5 United States of America under the UNCITRAL Rules
6 and NAFTA Chapter 11.

7 I will first introduce the Arbitral
8 Tribunal, Emmanuel Gaillard, and I'm the presiding
9 arbitrator in this matter. The other members of
10 the Arbitral Tribunal are to my right, Mr. Conrad
11 Harper, and to my left Professor Joseph Weiler.

12 Further to my right, Ms. Yas Banifatemi,
13 here is assisting the Tribunal as the
14 Administrative Secretary, and supposedly further to
15 my left--I don't know where he is now--here he
16 is--Mr. Gonzalo Flores from ICSID is also assisting
17 the Arbitral Tribunal.

18 At this juncture, I would like to take
19 this opportunity to thank ICSID for hosting this
20 procedural hearing. It's very kind of them. These
21 premises are very well suited for that. Although
22 it's not an ICSID case per se, they have pledged to

1 host NAFTA cases, so I really would like to thank
2 them for that.

3 Now, I would like also to introduce our
4 Court Reporter; Mr. David Kasdan is here from
5 Miller Reporting Company, and I turn to the
6 parties. I would like each side to introduce their
7 teams, and then we will turn to the other
8 delegations. So, on the claimant's side,
9 Mr. Landry, would you like to introduce your team
10 on behalf of claimant, or maybe if you prefer, each
11 can introduce--each member can introduce themselves
12 if you prefer that, but it's your turn.

13 MR. LANDRY: Mr. President, I will
14 introduce the people at our table. Myself, my name
15 is P. John Landry, and next to me is my co-counsel
16 Mr. Keith Mitchell, and next to Mr. Mitchell is
17 Professor Robert House from the University of
18 Michigan. Next to Mr. House is Professor Todd
19 Weiler from the University of Windsor in Canada.
20 And beside Mr. Weiler is David Calabrigo, who is
21 the General Counsel of Canfor, and beside
22 Mr. Calabrigo is my colleague Mr. Jeffrey Horswill.

1 PRESIDENT GAILLARD: Thank you. In
2 speaking to you, I realize that this layout is a
3 little weird in that I'm not--the Tribunal is not
4 exactly in the middle between the two parties, and
5 we will feel better about that by the afternoon.
6 We have to speak to you on the side and you have a
7 different ankle for the other side, but it's purely
8 a mechanical issue.

9 I also want to say that we have circulated
10 a list of attendees. It's for each group. It's
11 alphabetical order, so if you would be kind enough
12 to sign in front of your name, there is a box
13 across your name, and that is being circulated at
14 the moment.

15 I now turn to the respondent's side,
16 Mr. Taft. Would you be kind enough to introduce
17 your team.

18 MR. TAFT: Yes, Mr. President. My name is
19 William Taft, and I'm the Legal Advisor for the
20 Department of State. Immediately to my right is
21 Ronald Bettauer, who is the Deputy Legal Advisor
22 for the department. Next to Mr. Bettauer is Mark

1 Clodfelter, who is the Assistant Legal Advisor for
2 International Claims and Investment Disputes. Next
3 to him is Andrea Menaker, I believe, yes, there you
4 are, Andrea, Chief of the NAFTA Arbitration
5 Division in the Office of International Claims and
6 Investment Disputes. And next to her is Mark
7 McNeill, who is a member of the NAFTA Arbitration
8 Division. Next to him, I think, if I got it, yes,
9 is Jennifer Toole, who is also a member of the
10 NAFTA Arbitration Division. And we have two more
11 people down there from that same division, David
12 Pawlak. Are you there, David?

13 MR. PAWLAK: Yes.

14 MR. TAFT: And CarrieLyn Guymon. Are you
15 there?

16 MS. GUYMON: Yes.

17 MR. TAFT: Very good. Okay. So, that is
18 our team. Thank you, Mr. President.

19 PRESIDENT GAILLARD: Thank you very much.
20 Also attending this hearing are delegates from the
21 other NAFTA countries pursuant to the NAFTA rules,
22 Canada and Mexico. Would you like to be kind

1 enough to introduce yourselves? Maybe Canada
2 first.

3 MR. NEUFELD: I'm Rodney Neufeld from the
4 Trade Law Bureau, Canada.

5 MR. BECKER: I'm Steven Becker from the
6 law firm of Shaw Pittman, external counsel to the
7 Government of Mexico.

8 PRESIDENT GAILLARD: So, we also
9 understand that other members of the two states are
10 in attendance. Maybe you want to give your name
11 for the record.

12 MR. BLACK: John Black with the State
13 Department.

14 MS. SPOT: Laura Spot with the State
15 Department.

16 MS. BOYLE: Michelle Boyle, State
17 Department.

18 MS. EVANS: Kimberly Evans, U.S. Treasury
19 Department.

20 MR. FEIGHERY: Timothy Feighery, guest of
21 ICSID.

22 MR. PALMER: Jason Palmer, State

1 Department.

2 PRESIDENT GAILLARD: Thank you very much.

3 Finally, as you know, the parties have agreed to
4 make the hearing open to the public. The hearing
5 is thus broadcast live in a separate room within
6 the ICSID premises, so I want also to welcome those
7 attending the hearing, if any, in the other room.
8 We don't see you, but you see us. We will see
9 hello for once, and we will forget about you going
10 forward.

11 So, as far as we are concerned here, we
12 have the three days--three-day hearing. The
13 parties have been kind enough to agree to the
14 schedule, so this morning we will have presentation
15 of the U.S. argument which should last the whole
16 morning. Then we have a lunch break. We will this
17 afternoon have Canfor's response. And tomorrow
18 morning we have a U.S. reply and Canfor surreply,
19 shorter presentations.

20 As far as we are concerned, we have
21 decided to ask only clarification questions in the
22 course of those presentations. We will let you

1 express yourselves as you wish. We may interrupt
2 to ask some clarifications when we don't understand
3 and really on the point, but we will refrain to ask
4 more systematic questions and engage into a debate
5 at this stage, not to disrupt something you want to
6 say later or something you want to present
7 differently, so we will keep our questions. We do
8 have a number of questions, of course, and other
9 than for clarification questions, we would like to
10 ask those questions in the end.

11 So, it will be tomorrow morning at the end
12 of the morning, if we have very short presentation
13 in the morning, more likely tomorrow afternoon or
14 we could start in the morning and finish in the
15 afternoon, but I would caution you against filling
16 in your calendars too early because we do have
17 questions, and we want to have enough time to
18 address those questions. Even the third day
19 reserved should not be disposed of before the
20 Tribunal asks you to do so because we have reserved
21 the three days and we may well use the three days.
22 We may not, but we--at this stage we are not sure

1 not to be in a position to go faster than that.
2 It's not our intention to rush anything. We want
3 to have ample time to ask the questions. So don't
4 worry if we don't have too many substantive
5 questions at this stage during your presentations.
6 We will do this afterwards.

7 And as to the questions, we plan to ask
8 questions to at each question ask both parties,
9 give both parties. Some questions will be more
10 directed to one party or more than directed to
11 another, but we will have some opportunity to
12 comment on the answers going forward.

13 MS. MENAKER: Mr. President, I apologize
14 for interrupting. I just wanted to ask if other
15 people's feed is working? Our LiveNote is not
16 picking up any of the transcript.

17 PRESIDENT GAILLARD: It should be working.
18 Mine is working.

19 MS. MENAKER: Okay. So, perhaps during a
20 break.

21 PRESIDENT GAILLARD: So maybe can a
22 technician? We can break for a second. Would you

1 like, Mr. Kasdan, try to see one thing.

2 (Pause.)

3 PRESIDENT GAILLARD: For each party the
4 LiveNote is working? Good. All right.

5 So, we will this morning hear the U.S.
6 side, but before we do that, we have another set of
7 comments or remarks that I would like to make on
8 behalf of the Arbitral Tribunal.

9 Indeed, I have three remarks. The first
10 one has to do with the fact that we have read very
11 carefully --you hear that in every arbitration, the
12 Tribunal has read very carefully the pleadings.
13 It's true, and not only we have read very carefully
14 the pleadings and the documents, most of the
15 documents filed together with the pleadings, but we
16 have to say that we want to commend both parties
17 for having done such an excellent job. The quality
18 of these pleadings is extraordinary, and it was a
19 pleasure to read the briefs, and of course it makes
20 our life at the same time easier and more difficult
21 because not everybody can be right, but it was
22 really a pleasure to read this, and it's an

1 outstanding work, so I wanted to say that for the
2 record, and we really mean it.

3 The second remark is more substantive. We
4 the Tribunal, are well aware that there are
5 parallel proceedings on similar issues which have
6 issues in common or which are likely to have issues
7 in common. We have not studied that other than
8 what is available on the various Web sites, but we
9 understand, at least from that, and it was no
10 secret in this arbitration that other parties may
11 have an interest in other parties similarly
12 situated as compared with Canfor in this matter,
13 and they may have an interest in starting their own
14 proceedings and at least some of them have done so.

15 Here, we would like to make a series of
16 remarks on this. We are very mindful of the
17 existence of Article 1126 of NAFTA which provides
18 the possibility for consolidation at the request of
19 any party in any of these proceedings to have
20 another Tribunal decide on the issues which would
21 be--I would take the opportunity to call that they
22 would be similar, and they could dispose of these

1 issues for the sake of consistency and for the sake
2 of fair and efficient resolution of the claims to
3 track the language of Article 1126 of NAFTA.

4 Our own position on this is probably
5 irrelevant, but I would like to make it clear for
6 the Tribunal, for the record, and for the parties.
7 We believe that there is no right to be an
8 arbitrator or arbitrators. We believe that we are
9 here to serve the parties and to do--to resolve
10 differences when they need to be resolved. So, if
11 you want us to resolve these differences, we'll do
12 so. We will not shy out. We have no problem in
13 addressing the issues which you have been kind
14 enough to put before us.

15 That being said, we are equally
16 comfortable, if you were to use the tools which
17 NAFTA provides you, which for the sake of
18 consistency, is a consolidation, too. So, that's
19 perfectly fine. It goes without saying again we
20 have no right to be arbitrators, and it's your
21 rights, but you should be assured that we are
22 publicly comfortable with that. And indeed, from

1 our standpoint, we wonder if this would not be a
2 good idea to ensure consistency in using these
3 tools.

4 I had brief phone calls with each party on
5 this issue, and I, of course, disclosed to the
6 other party where I was calling the other party,
7 and I did it the same day five minutes later after
8 I called one party, I called the other, and that is
9 completely transparent, and both parties said at
10 this stage we have no intention to use Article
11 1126, which is fine, but I would like the parties
12 to think hard about that.

13 And, in fact, I would like the parties to
14 think about mechanism according to which you would
15 tell us your views on this. I'm not saying now.
16 I'm saying tomorrow or after the hearing. At some
17 point during this three-day hearing, I would like
18 the parties, both parties, to express their views
19 on this, and to think about something like we could
20 give you a time frame like mid-January when we are
21 going to start meeting or a little bit before we
22 start to meet to give you three weeks, two weeks,

1 whatever you need, to think about it, and let us
2 know your views on this, because we want to make
3 sure that you--we are sure that you think hard
4 about all the issues in this case, but we want to
5 make sure in an official way that you have
6 considered this issue carefully, and you have made
7 a determination that, for the time being, you
8 prefer not to use Article 1126.

9 This is not to mean that we want you to
10 waive after this period of time, say, mid-January,
11 whatever we will decide, any right to do so. If we
12 say--if in January you tell us no, we don't want
13 consolidate and then three weeks later you change
14 your mind, you change your mind, that's perfectly
15 fine. This is a right you have, and we are not
16 trying to pressure you to waive that right, but it
17 would be to have an indication and a little more
18 formally than a couple of phone calls about this
19 very important issue because it's an issue which is
20 important for the integrity of NAFTA, for the
21 integrity of the process, for the sake of
22 consistency, and the way the whole treaty works.

1 So, we want the parties not to take this issue
2 lightly.

3 It also goes without saying, and here I'm
4 not talking to the other room, but I'm talking to
5 the parties, but we are all mindful that it's not
6 just in your hands here or in your hands because we
7 have nothing to do with it. It's you, it's you,
8 but it's also other related parties. So, the U.S.
9 has several hats, but other parties also have their
10 own relationship with the U.S.

11 So, I think everybody should think hard
12 about that and then tell us what they think about
13 this process or this process issue.

14 And then again, don't read it the other
15 way around. We don't want anyone to waive
16 anything. But just to make a statement at one
17 point where at a given point in time they stand.

18 So, if there are no questions on that,
19 maybe you can address--you see what we have in
20 mind. You can address it at your leisure this
21 afternoon. Don't take it on your time of
22 presentation, maybe before the questions or at the

1 procedure when we discuss procedural steps you may
2 want to address these issues and tell us what you
3 think, not on the merits of this, but on the
4 process, do you want a time frame to think about
5 it, that kind of thing. So, that's the second
6 remark.

7 The third point is also procedural. At
8 some point--I mean, here we have a major point
9 which you are going to address, which basically is
10 all the jurisdictional questions which surround--I
11 say surround vaguely because there are other
12 provisions, of course, but which would surround
13 Article 1901(3). And that's the major issue which
14 you have fully addressed and which you have briefed
15 fully and extensively, and that's where your briefs
16 are of the utmost quality, and we feel that we have
17 heard you at least in writing. We have seen your
18 writings on this. We will hear you today about
19 that, tomorrow about that. So, we think that this
20 issue is procedurally ripe. We can dispose of that
21 issue after having heard you orally and after the Q
22 and A session. That's clear.

1 At some point, as you may know, as you
2 will remember, I'm sure you know, the Tribunal
3 would have liked to have also at the same level of
4 development the other potential jurisdictional
5 differences which the U.S. has raised surrounding
6 the idea of existence of an investment, who is an
7 investor, who qualifies under Chapter 11 as an
8 investor/investment issues. We suggested that to
9 be addressed by the parties in the same time frame
10 of these Chapter 19 defenses.

11 Apparently, the parties have not embraced
12 that idea with greater enthusiasm, although the
13 issue, we understand that the defense has been
14 raised. So, on the U.S. side there is an argument
15 that you're not an investor, you don't qualify
16 anyway. Even if you are right as to the true
17 meaning of 1901 and the relationship between
18 Chapter 19 and Chapter 11, even if you're right on
19 this, they say you're not an investor.

20 Now, we understand that this defense
21 exists, but we are--in our mind, it's clear that it
22 has not been briefed extensively. It has not been

1 developed to the same degree as the other argument.
2 So, although we--at some point we try to induce you
3 to sort of do it in the same track, at this point
4 being realistic, we realize that it has not been
5 the case. This issue, in our view, is not ripe, so
6 I don't know if you intended to discuss it at
7 length today, but I would tell you immediately so
8 that you can adjust your presentations and
9 certainly tell us if that was consistent with your
10 own expectations, that we think that it would be a
11 waste of time. We think--you are certainly free to
12 address this, but we think that the issue is not
13 ripe. Unlike the other issue, this issue has not
14 been briefed adequately due to your procedural
15 choices, which we respect, of course, and we are
16 leaning--what we wanted to avoid is piecemeal
17 arguments because we don't think it's fair to have
18 several jurisdictional phases before the merits.
19 So, as a result of this, if we--if our
20 determination is that we have to go forward,
21 depending on what we say on the issues surrounding
22 1901, we would join that to the merits. So, we

1 acknowledge the existence of this argument, but we
2 don't want to have a second phase only dedicated to
3 that in any event whatever we decide, so it's
4 either we say okay, there is a bar in Chapter 19,
5 and U.S. is right on this, so it's the end of the
6 story, or we say the U.S. is wrong on their
7 interpretation of Chapter 19, the relationship of
8 Chapter 19 and Chapter 11, so we have to go
9 forward. We will acknowledge the existence of
10 other jurisdictional arguments, but those will be
11 heard on the merits if this is what we decide.

12 So, in essence, I'm simply saying, and
13 please correct me if I'm wrong, and if you
14 were--both parties having a different understanding
15 as to the exercise today and tomorrow, but in our
16 view it's not an issue which we expect you to
17 address fully, because in any event, whatever we
18 decide on the other issues, it would be something
19 which will be decided later on or never, depending
20 if the first argument prevails.

21 So, I don't know if I'm clear on this, but
22 I would certainly at some point expect a reaction

1 as to that from a pure procedural standpoint to
2 know what is in front of us and what we have to
3 decide at this stage in the proceedings. Is that
4 clear? So maybe at some point you address this,
5 probably not now. So, I don't want to prolong
6 those opening remarks further, unless you have
7 specific questions on these issues. Right now very
8 briefly, maybe on claimant's side, before we hear
9 the presentation which we were to hear this
10 morning? Do you have anything to add or a question
11 on this, Mr. Landry?

12 MR. LANDRY: Thank you, Mr. President.
13 The only point I would make on your last, your
14 third comment, is that we had understood that if,
15 indeed, we get by this first jurisdictional phase,
16 that that jurisdictional question would be dealt
17 with at the merits.

18 PRESIDENT GAILLARD: So, in a sense maybe
19 I should hear the U.S. side, but in a sense there
20 would be agreement on this; is that correct on the
21 U.S. side? Maybe Mr. Taft?

22 MR. TAFT: Yes, Mr. President. We have

1 the same understanding with respect to those other
2 jurisdictional questions.

3 PRESIDENT GAILLARD: Right. So, on this I
4 can close the discussion in saying there is an
5 agreement that this is not part of this three-day
6 hearing, and it would be reserved for future
7 proceedings, future steps in the proceedings, if
8 any, to be fair to both parties; we can
9 characterize it like this. So, this is not
10 something on the table at this stage. Thank you.

11 So, now I'm sorry, Mr. Taft. We have
12 delayed your presentation. The floor is yourself.

13 OPENING STATEMENT BY COUNSEL FOR THE U.S.

14 DEPARTMENT OF STATE

15 MR. TAFT: Thank you, Mr. President,
16 members of the Tribunal, it's a pleasure to open
17 the United States's presentation today. I speak on
18 behalf of the entire United States team in saying
19 that we are honored to appear before you.

20 This is a case of immense importance. As
21 you have alluded to, there have now been three
22 claims challenging the antidumping and

1 countervailing duty determinations on Canadian
2 softwood lumber which have been filed against the
3 United States under NAFTA Chapter 11.

4 The decisions of this Tribunal, while not
5 binding on any other Tribunal, will clearly have,
6 therefore, wide future ramifications, and it is
7 critical for us, therefore, that this case be
8 decided correctly. In this connection, I should
9 say that we will respond in due course to your
10 inquiry about the 1126 process, but it will not be
11 part of our presentation this morning.

12 Today, we will demonstrate why this
13 Tribunal lacks jurisdiction over Canfor's claims.
14 We already demonstrated this in our written
15 pleadings and, of course, we stand by the written
16 arguments put forward in them. So, I will briefly
17 outline here our presentation.

18 Let me get to the heart of the matter.
19 The United States's jurisdictional objection is
20 straightforward. The United States did not consent
21 to arbitrate challenges to decisions in antidumping
22 and countervailing duty cases such as Canfor's

1 claims here under the investment chapter of the
2 NAFTA. Rather, the NAFTA parties established a
3 specialized binational panel mechanism in Chapter
4 19 and provided those binational panels with
5 exclusive jurisdiction over such matters. They
6 explicitly excluded antidumping and countervailing
7 duty matters from state to state dispute resolution
8 under Chapter 20.

9 To ensure no ambiguity as to their intent,
10 the parties also included Article 1901(3). That
11 provision reads, and I'm quoting it, except for
12 Article 2203, entry into force, no provision of any
13 other chapter of this agreement shall be construed
14 as imposing obligations on a party with respect to
15 the party's antidumping law or countervailing duty
16 law, unquote.

17 It could not be clearer. Chapter 11
18 cannot be construed as imposing any obligations
19 with respect to antidumping or countervailing duty
20 laws. Thus, there can be no Chapter 11 arbitration
21 concerning the enforcement of those laws and duties
22 imposed pursuant to them, and there is no basis for

1 this Tribunal to assume jurisdiction in this case.

2 The softwood lumber dispute between Canada
3 and the United States is decades old. Canada has
4 challenged the determination's imposing duties on
5 Canadian softwood lumber before the WTO and under
6 Chapter 19 of the NAFTA. Canfor has also taken
7 advantage of the Chapter 19 process and has
8 challenged these duties in that forum.

9 Despite the NAFTA's express terms and the
10 clear intention of the NAFTA parties, Canfor now
11 seeks resort to investor-state arbitration to
12 challenge, yes, these same duties. Canfor's
13 arguments before this Tribunal, however, ignore the
14 treaty's express terms. Acceptance of those
15 arguments would be contrary to the NAFTA parties'
16 intent. Although Canfor acknowledges that its
17 claims arise out of U.S. antidumping and
18 countervailing duty law, it argues that somehow the
19 arbitration of its claims in this forum will not
20 impose obligations on the United States, quote,
21 with respect to, unquote, such laws. This is
22 untenable. Canfor's argument's seeking to draw a

1 distinction between a law and the application of
2 that law are similarly untenable.

3 The context of Article 1901(3), as well as
4 the NAFTA's object and purpose, confirm that claims
5 such as Canfor's are reserved for exclusive review
6 under the NAFTA by Chapter 19 Panels. Canfor's
7 arguments, if accepted, would completely undermine
8 the effort of the NAFTA parties to restrict such
9 matters to the specialized mechanism of Chapter 19.

10 Given the NAFTA's express terms, it is
11 clear that the NAFTA parties, in establishing a
12 Chapter 19 mechanism, did not intend to provide for
13 investor-state arbitration of claims such as
14 Canfor's. Pursuing such claims is an abuse of the
15 Chapter 11 process. We therefore request that the
16 Tribunal dismiss Canfor's claim for lack of
17 jurisdiction and award full costs to the United
18 States.

19 This morning, we will proceed in our
20 presentation as follows: Mr. Clodfelter first will
21 provide the factual background of the
22 jurisdictional issue for you. Ms. Menaker will

1 demonstrate that the ordinary meaning of Article
2 1901(3) deprives this Tribunal of jurisdiction over
3 Canfor's claims. Mr. McNeill will explain how
4 Article 1901(3)'s context and the object and
5 purpose of the treaty confirm this result. And
6 finally, Mr. Bettauer will briefly conclude the
7 first round presentation of the United States.

8 Before asking the Tribunal to give
9 Mr. Clodfelter the floor, I would like to make one
10 more point. Mr. President, members of the
11 Tribunal, it is an important function, and the
12 President alluded to this in his opening remarks,
13 it is an important function of an oral hearing to
14 provide an opportunity to answer any questions or
15 concerns that the Tribunal may have, and we will
16 certainly respond in the same form as the President
17 suggested will be the preference of the panel, and
18 my colleagues welcome those questions.

19 We will, of course, try to answer them in
20 the course of this hearing when they are raised.
21 However, I would say that because my colleagues and
22 I represent the government, it may at times be

1 necessary to request the Tribunal's indulgence so
2 that we can confer with our colleagues from other
3 agencies at a break, perhaps about a particular
4 question, and then respond with the position of the
5 United States Government thereafter. I think this
6 will work efficiently, but I wanted to alert you to
7 that situation and the responsibilities we have in
8 responding to your questions.

9 Mr. President, members of the Tribunal,
10 thank you for your attention. I would now invite
11 the Tribunal to turn the floor over to
12 Mr. Clodfelter.

13 PRESIDENT GAILLARD: Thank you, Mr. Taft.
14 Before I do so, on the point you raised, your point
15 is well-taken, and I don't know if Mr. Landry has
16 anything to say on that, we'll ask him, but as far
17 as we are concerned, we understand that. That's
18 why we didn't want to, although your agreement uses
19 a day and a half, I didn't want people to fill
20 their calendars because we may need the rest of the
21 time for the questions and that would allow certain
22 short, hopefully, pauses to have a position,

1 especially on the respondent's side, which reflects
2 the position of the government as a whole and not
3 any specific department or agency. We understand
4 that.

5 Mr. Landry, do you have an issue with
6 that?

7 MR. LANDRY: Mr. President, we don't have
8 any issue in responding to questions to be dealt
9 with in that way.

10 PRESIDENT GAILLARD: So, that will be the
11 way in which we will operate. At your request, you
12 will tell us when you answer a question, we can't
13 answer that now; on this issue we prefer to consult
14 and need a 10-minute break or something. Thank
15 you.

16 MR. TAFT: Thank you, Mr. President.

17 PRESIDENT GAILLARD: Thank you very much.

18 Mr. Clodfelter, you want to continue the
19 presentation on respondent's side?

20 MR. CLODFELTER: Thank you, Mr. President,
21 members of the Tribunal, I believe we are ready to
22 proceed. Before we get into our legal arguments,

1 as Mr. Taft said, I would like to go over some of
2 the factual background relevant to the
3 jurisdictional issue before you.

4 Let me begin by saying that we agree with
5 Canfor that in deciding this issue you may accept
6 as true for purposes of the argument the facts as
7 alleged by Canfor. However, this does not mean
8 that, as Canfor stated in its briefs, you must
9 accept the legal conclusions that Canfor would have
10 you draw on the basis of those assumed facts.
11 Thus, for example, it is not among the facts to be
12 assumed that Canfor has been subject to arbitrary,
13 discriminatory, or abusive conduct. It failed to
14 meet the standards of Chapter 11 of NAFTA. Canfor
15 may wish to have you dwell on those proffered
16 conclusions in hopes that they will color your
17 consideration of the jurisdictional issue; but
18 these are legal conclusions, and they go to the
19 merits of Canfor's claims. We strongly deny any
20 such conclusions, but don't intend to address them
21 further here.

22 We also disagree with the assertion made

1 by Canfor that you should confine yourselves to the
2 facts pled by it, the investor. Indeed, in
3 paragraph 47 of your January 23rd decision on
4 bifurcation, you invited the parties to, quote,
5 discuss any evidence of fact or law, unquote, and
6 we will discuss certain facts not pled by Canfor.
7 In any event, I don't believe that any of the
8 factual points I will discuss are contested.

9 So, this morning, I begin by providing an
10 overview of the antidumping and countervailing duty
11 law of the United States. I will then describe the
12 circumstances leading up to the inclusion of
13 Chapter 19 in NAFTA and its relationship to the
14 other chapters of NAFTA. I will then turn to a
15 description of the Chapter 19 specialized
16 binational panels for addressing challenges to the
17 NAFTA party's antidumping and countervailing duty
18 determinations. Then I will describe the
19 underlying dumping and subsidy dispute and the
20 antidumping and countervailing duty determinations
21 made on that dispute.

22 Finally, before summing up, I will

1 describe Canfor's reactions to those determinations
2 and compare the claims Canfor submitted to Chapter
3 19 panels and to this Tribunal with respect to
4 those determinations.

5 So, let's begin with a simplified overview
6 of the administration of antidumping and
7 countervailing duty cases under U.S. law and using
8 this screen to illustrate. Canfor challenges
9 antidumping and countervailing duty determinations
10 concerning softwood lumber from Canada that were
11 made by the United States Department of Commerce
12 and the United States International Trade
13 Commission or ITC. The Commerce Department is an
14 agency in the Executive Branch of the Federal
15 Government headed by a member of the President's
16 cabinet. The ITC is an independent nonpartisan
17 quasi-judicial Federal agency that was established
18 by Congress.

19 Under U.S. law, specifically the Tariff
20 Act of 1930, domestic industries may petition the
21 Commerce Department and the ITC for relief from
22 unfairly low priced--that is, dumped--imports and

1 unfairly subsidized imports. The Commerce
2 Department and the ITC conduct parallel
3 investigations. The Commerce Department determines
4 whether dumping or subsidies exist, and if they do,
5 the margin of dumping or the amount of the subsidy.
6 It also determines whether certain critical
7 circumstances exist that would allow for the
8 retroactive application of duties.

9 The ITC, in turn, determines whether the
10 dumped or subsidized imports materially injure or
11 threaten to materially injure the U.S. industry
12 producing a like product. The Commerce Department
13 and the ITC each make preliminary and final
14 determinations. If both agencies make affirmative
15 final determinations, an antidumping duty order or
16 a countervailing duty order will be imposed, and
17 duties on the imports will be assessed to offset
18 the dumping or subsidies.

19 As a general matter, preliminary
20 determinations by Commerce and the ITC may not be
21 reviewed under U.S. law. Final determinations,
22 however, are reviewable under U.S. law. They are

1 appealable to the U.S. Court of International
2 Trade, which is a national court established
3 pursuant to Article Three of the U.S. Constitution
4 consisting of nine judges appointed by the
5 President with the advice and consents of the
6 Senate. Decisions of the Court are further
7 appealable to the Federal Circuit Court of Appeals
8 and by certiorari to the U.S. Supreme Court.

9 Historically, the Court of International
10 Trade had exclusive jurisdiction to review
11 challenges to U.S. antidumping and countervailing
12 duty determinations. This changed with the
13 Canada-U.S. Free Trade Agreement when it came into
14 force in 1989.

15 During the negotiation of the Canada-U.S.
16 Free Trade Agreement, Canada and the United States
17 sought to agree on a common set of rules to govern
18 disputes over dumping and subsidies. First, they
19 considered a number of approaches to the questions
20 of substantive rules. These change ranged from the
21 possibility of abandoning the idea of special
22 antidumping and countervailing duty mechanisms

1 altogether in favor of reliance upon competition
2 laws, to the possibility of substituting a common
3 set of substantive rules to govern dumping and
4 subsidies for the existing municipal law-based
5 rules. However, they were not able to agree upon a
6 common set of substantive rules.

7 Instead, the U.S. and Canada opted for a
8 procedural mechanism that left the existing
9 national mechanisms and standards in place, but
10 gave each party the option of having antidumping
11 and countervailing duty determinations reviewed by
12 special ad hoc binational panels instead of by
13 their national courts.

14 The binational panels would decide such
15 challenges by applying the respective parties'
16 domestic antidumping and countervailing duty law.
17 Accordingly, the Canada-U.S. Free Trade Agreement
18 required the United States to amend its laws to
19 transfer exclusive jurisdiction over final
20 antidumping and countervailing duty claims from the
21 U.S. Court of International Trade to the binational
22 panels whenever a panel proceeding had been

1 requested.

2 This binational panel mechanism set forth
3 in the U.S.-Canada Free Trade Agreement was
4 essentially carried over into NAFTA Chapter 19, of
5 course, on a trilateral basis.

6 So, let us turn to that mechanism as it is
7 provided for in Chapter 19.

8 Chapter 19 is entitled Review and Dispute
9 Settlement in Antidumping and Countervailing Duty
10 Matters." It establishes a special, self-contained
11 dispute resolution for all antidumping and
12 countervailing duty matters, including the review
13 of a NAFTA party's final antidumping and
14 countervailing duty determinations. Article
15 1904(1) provides, and I quote, As provided in this
16 Article, each party shall replace judicial review
17 of final antidumping and countervailing duty
18 determinations with binational panel review. And
19 as provided in Annex 1901.2, binational panels
20 consist of five members who are nationals of the
21 parties involved. They must be experts in
22 International Trade Law, and active or former

1 judges are to be appointed, to the extent possible.

2 As required in paragraph eight of the
3 United States schedule under Annex 1904.15, the
4 United States accordingly amended the Tariff Act of
5 1930 to prohibit review by the Court of
6 International Trade when binational panel review
7 has been requested.

8 The binational panel mechanism is intended
9 to mimic the parties' domestic court review of
10 antidumping and countervailing duty matters. In
11 other words, the binational panels stand in the
12 shoes of the domestic occurs of the importing
13 party, in this instance the Court of International
14 Trade. The binational panels must apply the
15 domestic laws of the parties, including the
16 domestic law standard of review. When reviewing
17 antidumping or countervailing duty determinations,
18 for instance, Article 1904(3) requires that, as you
19 can see on the screen, the panels shall apply the
20 standard of review set out in Annex 1911, and the
21 general legal principles that a court of the
22 importing state or party otherwise would apply to a

1 review of a determination of a competent
2 investigating authority.

3 Taking a look at that Annex 1911, you will
4 see that the standard of review to be applied to
5 U.S. determinations is that set out in the Tariff
6 Act of 1930 as amended, specifically Section 516(a)
7 subparagraph (B) (1) (b), which is the substantial
8 evidence standard. I will quote, The Court or
9 under Chapter 19 the binational panel, shall hold
10 unlawful any determination, finding, or conclusion
11 found to be unsupported by substantial evidence on
12 the record, or otherwise not in accordance with
13 law. Thus, the Chapter 19 panel may not substitute
14 its own judgment for that of the agency or engage
15 in de novo review. Moreover, just as the Court of
16 International Trade has jurisdiction only over
17 final antidumping and countervailing duty
18 determinations with a few exceptions, the Chapter
19 19 Panel is authorized to review only final U.S.
20 determinations, not preliminary determinations.
21 This is provided in Article 1904 as well, as you
22 can see on the screen.

1 What power does a binational panel have?
2 As provided for in Article 1904(8), Chapter 19
3 binational panels are authorized to uphold final
4 determinations or remand them, quote, for action
5 not inconsistent with the panel's decision.

6 One final point on the process, I
7 mentioned the decisions on the Court of
8 International Trade may be appealed to higher U.S.
9 courts. The parallel is that a Chapter 19 Panel
10 decision may be subject to the extraordinary
11 challenge procedure provided for in Article
12 1904(13).

13 So, that, in a nutshell, is how the
14 Chapter 19 mechanism works. As can be seen,
15 Chapter 19 reflects a number of fundamental
16 decisions of the parties with respect to
17 antidumping and countervailing duty law.

18 First, the parties decided that the
19 preexisting substantive standards that each country
20 applied in deciding whether sanctionable dumping or
21 subsidization has occurred would continue to be the
22 standards under the NAFTA.

1 Second, they decided that the preexisting
2 municipal law procedures, practices, and procedural
3 standards in place for deciding claims of unfair
4 dumping and subsidies and setting corrective duties
5 would continue to be the mechanisms for deciding
6 these questions under NAFTA.

7 Third, they decided that challenges to the
8 decisions emanating from these mechanisms as well
9 as the conduct leading to those decisions could, at
10 the option of the challenging party, be reviewed by
11 binational panels instead of binational courts.

12 Fourth, they decided that in deciding
13 challenges to decisions and the conduct underlying
14 them, binational panels had to apply the legal
15 standards of municipal law.

16 Those are the four essential decisions
17 reflected in the provisions of Chapter 19, but
18 having made these decisions, the parties took the
19 additional necessary step to make them effective,
20 to ensure that antidumping and countervailing duty
21 matters could not be subject to obligations under
22 other chapters of NAFTA, including substantive

1 obligations of treatment and any obligation to
2 submit challenges to the decisions of the national
3 mechanisms to dispute resolution fora other than
4 national courts or binational panels, the parties
5 included Article 1901(3).

6 Let me repeat what Mr. Taft quoted
7 earlier. Article 1901(3) provides, except for
8 Article 2203, no provision of any other chapter of
9 this agreement shall be construed as imposing
10 obligations on a party with respect to the party's
11 antidumping and countervailing duty law. With this
12 provision and in this manner, the parties
13 effectively cabined Chapter 19 from the rest of the
14 NAFTA.

15 Now, let's turn from how Chapter 19 works
16 to the claim at issue here. The claim before you
17 has its origins in 1901, when a U.S. industry group
18 filed petitions with the Commerce Department and
19 the ITC, requesting investigations into the
20 practices of Canadian softwood lumber producers.
21 The petitions allege that the United States
22 softwood lumber industry was being materially

1 injured by reason of dumped and subsidized softwood
2 lumber imports from Canada. In response to these
3 petitions, the Commerce Department and the ITC
4 initiated the antidumping and countervailing duty
5 investigations, and the material injury
6 investigation that led to the determinations at
7 issue in this arbitration.

8 During the course of these investigations,
9 the Commerce Department issued preliminary
10 determinations that Canadian softwood lumber was
11 being subsidized by Canada and dumped on the U.S.
12 market. Commerce also made a preliminary critical
13 circumstances determination.

14 And then in March and May of 2002,
15 respectively, the Commerce Department and the ITC
16 issued final determinations which resulted in the
17 imposition of specific antidumping duties upon
18 Canfor and countrywide countervailing duties on
19 Canadian imports of softwood lumber, including
20 those imported by Canfor. However, the Commerce
21 Department did not find the critical circumstances
22 it had made in its preliminary determination.

1 Well, what was the reaction to these
2 determinations? As you know, the Government of
3 Canada has challenged these determinations before
4 the WTO. For its part, Canfor took two actions in
5 response to the determinations. First, as it is
6 entitled to do under NAFTA Chapter 19, in April and
7 May 2002, it joined the Canadian government and
8 other parties in requesting Chapter 19 binational
9 panel proceedings to review those determinations.
10 Those panel reviews are still continuing. And
11 while remands, in part, have been made with respect
12 to all of the final determinations, the panels have
13 upheld much of what Commerce and the ITC finally
14 determined and the manner in which they made those
15 final determinations.

16 I would only add that the most recent
17 panel decision on the ITC's material injury
18 determination is now the subject of an
19 extraordinary challenge under Article 1904(13).

20 So, that's the first action that Canfor
21 took. And, of course, the second action that it
22 took a few months after joining the Chapter 19

1 proceedings was to file the NAFTA Chapter 11 claim
2 before you. In doing so, Canfor has targeted the
3 same actions of the United States, and its claims
4 before this Tribunal essentially mirror those that
5 were brought before the binational panels under the
6 exclusive mechanism of Chapter 19.

7 Let's compare Canfor's challenges under
8 the two chapters. In both proceedings Canfor
9 challenges the same antidumping, countervailing
10 duty, and material injury determinations made by
11 the Commerce Department and the ITC. It also
12 asserts many of the same grounds for its challenges
13 that it asserts in the Chapter 19 proceedings. For
14 example, in both sets of proceedings, Canfor
15 complains that Commerce misinterpreted and
16 misapplied U.S. antidumping and countervailing duty
17 laws as can be seen by comparing the notice of
18 arbitration with the briefs in the Chapter 19
19 proceedings.

20 As an example as depicted on the slide,
21 Canfor alleges that Commerce improperly engaged in
22 a zeroing technique in calculating dumping margins.

1 In the case before you, Canfor alleges that
2 Commerce, quote, continued to utilize zeroing,
3 thereby skewing the average dumping margins,
4 unquote. Before the Chapter 19 Panel, Canfor
5 argued, quote, Commerce created artificial dumping
6 margins through the unlawful practice of zoning--of
7 zeroing, excuse me. You can see these parallel
8 quotations on the first row on the slide.

9 As another example, in both proceedings
10 Canfor claims that Commerce improperly allocated
11 production costs for Canadian producers. In the
12 case here, it alleges that Commerce, quote,
13 allocated costs based only on a difference in grade
14 of lumber and not differences in value attributable
15 to dimension or length, unquote. It argued before
16 the Chapter 19 Panel that Commerce allocated costs
17 only for, quote, different grades of lumber, but
18 did not carry that methodology through to different
19 sizes. These are depicted on the two rows, second
20 row of the slide.

21 Canfor also argued here--also argues here
22 that Commerce used an unfair comparison between

1 softwood lumber prices in Canada and similar
2 products in the United States. It made the same
3 argument before the Chapter 19 Panel, as you can
4 see in the third row of the slide.

5 Canfor's allegations also echo each other
6 in both sets of proceedings with respect to
7 Commerce's countervailing duty determination. This
8 can be seen on the next slide. Canfor has alleged
9 before this Tribunal, and that's on the first
10 column, that Commerce, quote, failed to provide any
11 reasonable analysis in determining that provincial
12 stumpage programs are a financial contribution,
13 unquote, and that Commerce erroneously, quote,
14 concluded that the provincial stumpage programs are
15 specific, unquote, to an industry or enterprise.

16 And then in the third row on that first
17 column, you will see that Canfor also alleges here
18 that Commerce improperly denied Canfor a
19 company-specific subsidy rate. It argues that
20 Commerce, quote, arbitrarily determined that a
21 countrywide rate would be utilized, unquote. As
22 can you see, before the Chapter 19 Panel reviewing

1 Commerce's countervailing duty determination,
2 Canfor has raised the same complaints as shown in
3 the second column of the slide.

4 These are only a few of the grounds relied
5 upon by Canfor in challenging the Commerce and ITC
6 determinations common to this proceeding and to the
7 Chapter 19 binational panel proceedings.

8 In sum, Canfor is seeking to challenge the
9 same actions of the United States Government
10 simultaneously under two different chapters of
11 NAFTA under two different dispute resolution
12 processes. But in relation to this area of
13 government action at least, that is the area of
14 antidumping and countervailing duty regimes, the
15 parties expressly excluded this possibility. They
16 carefully provided that the country's antidumping
17 and countervailing duty mechanisms would remain in
18 place, contradicting any notion that those
19 mechanisms could be attacked as violating
20 provisions of other chapters. They provided that
21 the decisions that emerged from those mechanisms
22 could only be reviewed against the standards of

1 municipal law, not de novo and not against the
2 standards of international law. And they provided
3 that the only NAFTA dispute resolution process
4 available for such review is the binational panel
5 process of Chapter 19.

6 And they did this through the terms of
7 Article 1901(3). My colleague, Ms. Menaker, will
8 now demonstrate how by its plain meaning Article
9 1901(3) deprives this Tribunal of jurisdiction over
10 Canfor's claims.

11 ARBITRATOR HARPER: Mr. Clodfelter,
12 perhaps Ms. Menaker will address this matter,
13 perhaps not, so I thought I would begin with you.

14 I would like to know the position of the
15 United States in terms of clarification of 1901(3)
16 which talks about antidumping law and
17 countervailing duty law.

18 Is it the position of the United States
19 that those terms include the preliminary and final
20 determinations of Commerce and ITC and in that
21 respect, what is the position of the United States
22 insofar as that term, antidumping law and

1 countervailing duty law in 1901(3) as compared to
2 Article 1902.1, which defines antidumping law and
3 countervailing duty law to include administrative
4 practice?

5 MR. CLODFELTER: Mr. Harper, actually, I
6 think Ms. Menaker will be addressing that, but she
7 can give you a preliminary answer now.

8 ARBITRATOR HARPER: I'm content to hear
9 her presentation as she intended it. I just wanted
10 to make sure, having heard you talk about 1901(3),
11 that the matter was addressed by someone on the
12 United States's side.

13 MS. MENAKER: Yes, we will be--I will be
14 addressing that, but just not to keep you in
15 suspense, the answer is that, yes, it is our
16 contention that the phrase "antidumping law" and
17 "countervailing duty law" does, indeed, encompass
18 the preliminary and final determinations that are
19 at issue in this case, and that is done
20 specifically by looking at the definition as you
21 pointed out that is in Article 1902, subparagraph
22 one which, as you noted, does include the term

1 "administrative practice." And, indeed, a
2 determination by the Department of Commerce or the
3 International Trade Commission is, indeed, an
4 administrative practice.

5 PRESIDENT GAILLARD: Mr. Clodfelter,
6 before we turn to Ms. Menaker for the ordinary
7 meaning argument, since you have addressed the
8 question of duplication, do you want to answer at
9 this stage, or do you intend to answer later when
10 argument which is raised by Canfor--I'm sorry, if I
11 misstate the argument, and I'm sure we will hear
12 about the argument--which is, in essence--you may
13 point to some areas of duplications, and to the
14 extent duplication is relevant, and I know that
15 Canfor says it doesn't matter anyway, but in
16 addition to it doesn't matter anyway argument there
17 is an argument which in a sense I understand it
18 well, and I'm sure this afternoon I will be
19 corrected if I don't understand it well--which says
20 well, maybe there some element of duplication, but
21 you would have the burden of proof to show that
22 everything is duplicative. So what if some is not

1 duplicative? So, do you want address that maybe in
2 the questions, or that type of arguments in the
3 burden of proof of the extent of duplication to the
4 extent duplication is relevant at all?

5 MR. CLODFELTER: Yes, I believe
6 Mr. McNeill will be addressing that issue in part
7 in his presentation because even though there is
8 enormous overlap between the two sets of
9 proceedings, we don't maintain that every
10 allegation they made in one is made in the other.
11 Nor do we have to. Our position is we have no such
12 burden of demonstration whatsoever, and Mr. McNeill
13 will make clear why the similarities between the
14 two sets of proceedings are relevant to the
15 interpretation of 1901(3).

16 PRESIDENT GAILLARD: So, as long as you
17 address it at some point, it's fine. And again, if
18 I caricature your argument, you will also tell me.

19 For the record, we have received the
20 slides of the presentation. It's 18 pages, and I
21 take it that Canfor Corp. has received the same
22 document, which is the slides which were shown and

1 used during Mr. Clodfelter's presentation.

2 And we just received a moment ago the
3 slides which I understand will be used by
4 Ms. Menaker; is that right? So, claimant has
5 received the same two sets of slides. Can you
6 confirm that for the record?

7 MR. LANDRY: Yes, we have.

8 PRESIDENT GAILLARD: Right. So can you go
9 on, I guess, Ms. Menaker. Thank you.

10 MS. MENAKER: Thank you. Before I begin,
11 if I may ask Mr. Flores if it would be possible for
12 me to remove the podium. Just it will make it, I
13 think, easier to read from the screen.

14 PRESIDENT GAILLARD: Also, if I may, you
15 have paused at any time. We are not going to tell
16 you when to have a pause. I think for the parties
17 to decide. In particular the party presenting the
18 argument tell us when the most convenient time
19 during the course of the morning to stop. We are
20 not going to suggest any break.

21 THE SECRETARY: In that same line,
22 Mr. President, if we can have a five-minute break,

1 we can get rid of the podium.

2 PRESIDENT GAILLARD: All right. So, we
3 have a five-minutes break, and you want what? The
4 podium to be removed?

5 MS. MENAKER: Yes, it will just make it
6 easier for me to read the screen.

7 PRESIDENT GAILLARD: Fine. Let's have a
8 five-minute break, and we will reconvene in five
9 minutes. Meanwhile, the podium will be removed.
10 Thank you.

11 (Brief recess.)

12 PRESIDENT GAILLARD: We go back on the
13 record on the claimant's side. Are we ready?
14 Mr. Landry?

15 MR. LANDRY: Yes, we are ready, thank you.

16 PRESIDENT GAILLARD: Ms. Menaker, the
17 floor is yours.

18 MS. MENAKER: Yes, thank you. And I would
19 just note that Mr. Taft sends his apologies that he
20 had to leave the hearing at this time.

21 PRESIDENT GAILLARD: Understood.

22 MS. MENAKER: Mr. President, members of

1 the Tribunal, I will now demonstrate that the NAFTA
2 by its clear terms, deprives this Tribunal's
3 jurisdiction.

4 As my colleague Mark Clodfelter just
5 described, challenges to a party's antidumping law
6 and countervailing duty law and their antidumping
7 and countervailing duty determinations are heard by
8 Chapter 19 binational panels which apply domestic
9 law. The NAFTA parties did not consent to
10 investor-state arbitration of challenges to their
11 antidumping or countervailing duty determinations.
12 Nor did they consent to having those determinations
13 governed by the international law standards and
14 NAFTA Chapter 11.

15 This is made clear by the NAFTA's text.
16 Article 1901(3), which you've already heard quoted
17 to you many times today, and which I have placed on
18 the screen, provides that, quote, except for
19 Article 2203 entry into force, no provision of any
20 other chapter of this agreement shall be construed
21 as imposing obligations on a party with respect to
22 the party's antidumping law or countervailing duty

1 law. The ordinary meaning of this phrase, this
2 provision, is unambiguous. It requires dismissal
3 of Canfor's claims.

4 My argument will follow in two parts. I
5 will begin by focusing on the first half of the
6 sentence in Article 1901(3) and explain how
7 exercising jurisdiction over Canfor's claims would
8 impose obligations on the United States from
9 provisions of the NAFTA that are outside of Chapter
10 19. I will then review the remainder of the
11 article and demonstrate that the obligations Canfor
12 seeks to have imposed are with respect to the
13 United States's antidumping law or countervailing
14 duty law. In some cases I may refer to antidumping
15 law and countervailing duty law for ease of
16 reference as AD/CVD law.

17 Now, if this Tribunal were to enterprise
18 jurisdiction over Canfor's claims, it would result
19 in the imposition of obligations on the United
20 States that derive from chapters of the NAFTA other
21 than Chapter 19. Two distinct types of obligations
22 would be imposed. First, the obligation to

1 arbitrate derives from provisions in Chapter 11 of
2 the NAFTA. To compel the United States to
3 arbitrate a dispute in accordance with the
4 procedures that are set forth in Section B of NAFTA
5 Chapter 11 would be to impose an obligation of the
6 United States that derives from provisions of a
7 chapter outside of Chapter 19.

8 Second, Canfor seeks to apply the
9 substantive international law standards that are
10 set forth in Section A of Chapter 11 of the NAFTA
11 to its claims. Canfor asks this Tribunal to review
12 the AD/CVD determinations and assess whether in
13 imposing duties on lumber that is imported by
14 Canfor, the United States violated the national
15 treatment, the most-favored-nation treatment, the
16 minimum standard of treatment, and the
17 expropriation Articles. All of these obligations
18 derive from the NAFTA's investment chapter, Chapter
19 11.

20 Subjecting the U.S. antidumping and
21 countervailing duty determinations to review under
22 the international legal standards in Chapter 11

1 imposes obligations on the United States from a
2 chapter outside of Chapter 19. For example, under
3 Canfor's theory, a Chapter 11 Tribunal could
4 consider whether the United States applied its
5 trade law in a manner that accorded Canfor
6 treatment that was less favorable than that which
7 was accorded to a softwood lumber producer from a
8 non-NAFTA country such as Russia. Were it to do so
9 and were it to then impose liability on the United
10 States for a violation of the most-favored-nation
11 treatment provision, it would be construing
12 provisions in the NAFTA other than those that are
13 set forth in Chapter 19 to impose an obligation on
14 the United States with respect to its antidumping
15 and countervailing duty law.

16 Canfor argues that exercising jurisdiction
17 over its claims would not impose obligations on the
18 U.S. that derives from chapters outside of Chapter
19 19. It claims that the international legal
20 obligations contained in Chapter 11 are customary
21 international legal obligations that the United
22 States would be bound to adhere to even in the

1 absence of a treaty.

2 This argument is wrong for three reasons.

3 First, whether or not customary international law
4 is the basis for the substantive provisions of
5 Chapter 11, Canfor's claim is based upon the
6 provisions themselves. Because those provisions
7 are in a chapter other than Chapter 19, they may
8 not be invoked to impose obligations on the U.S. in
9 contravention of Article 1901(3).

10 Second, the fact is that several of the
11 international legal obligations that Canfor seeks
12 to impose on the United States are not customary
13 international law obligations, but are conventional
14 treaty obligations. Examples of these are the
15 obligation to provide national treatment and
16 most-favored-nation treatment. In the absence of
17 Articles 1102 and 1103, the United States would
18 have no such obligation.

19 So, it is simply incorrect to state that
20 the obligations Canfor seeks to have imposed on the
21 United States do not emanate from a chapter outside
22 of Chapter 19.

1 And finally, even for those international
2 legal obligations that do form a part of customary
3 international law, the United States would have no
4 obligation to arbitrate a dispute with the private
5 claimant such as Canfor, absent the provisions in
6 NAFTA Chapter 11. In provisions in NAFTA Chapter
7 11, the United States gave its consent to
8 investor-state arbitration. Absent those
9 provisions, Canfor would have no ability to
10 commence an arbitration against the United States
11 alleging a violation of the national treatment,
12 most-favored-nation treatment, minimum standards of
13 treatment, and expropriation provisions.

14 Exercising jurisdiction over any of
15 Canfor's claims would thus impose obligations on
16 the United States that derive from chapters outside
17 of Chapter 19.

18 I will now turn to the second half of the
19 sentence that comprises Article 1901(3), and I will
20 demonstrate that the obligations that would be
21 imposed on the United States if the Tribunal
22 exercised jurisdiction in this case would be

1 imposed with respect to the United States's
2 antidumping law or countervailing duty law.

3 Canfor has argued that despite challenging
4 the USA AD/CVD determinations, its claim does not
5 impose obligations on the United States with
6 respect to its AD/CVD law. It makes arguments
7 based both on the phrase "with respect to" and the
8 phrase "antidumping law or countervailing duty
9 law," both of which appear in Article 1901(3).

10 I will first address why Canfor's
11 construction of the phrase "with respect to," and I
12 will show why Canfor's interpretation of that
13 phrase is at odds with the term's ordinary meaning.

14 I will then demonstrate why Canfor's
15 interpretation of the phrase "antidumping law or
16 countervailing duty law" is also inconsistent with
17 that phrase's ordinary meaning, would be at odds
18 with the parties' intention and would render
19 Article 1901(3) ineffective, which would violate
20 one of the cardinal principles of treaty
21 interpretation.

22 So, I will first turn to addressing their

1 interpretation, Canfor's interpretation of the term
2 "with respect to" in Article 1901(3).

3 In its notice of arbitration, as I've
4 projected on the screen, Canfor acknowledges that
5 its claims are brought in connection with the
6 United States's alleged violations of the NAFTA
7 that, quote--well, I will read the quote in its
8 entirety so it's grammatically correct. Canfor
9 alleges that it brings this claim in connection
10 with the Government of the United States's
11 violations of NAFTA Articles 1102, 1103, 1105, and
12 1110, arising out of, and in connection with,
13 conduct of the Government of the United States
14 which resulted in the issuance of the
15 determinations.

16 In its reply, Canfor concedes that the
17 violations it alleges, and I quote, arise out of,
18 end quote, the application of the United States's
19 antidumping law and countervailing duty law.

20 Canfor, nevertheless, argues that its
21 claims do not impose obligations on the United
22 States with respect to its AD/CVD law because, and

1 I quote from Canfor's rejoinder, its claims, quote,
2 have as their genesis unfair, inequitable, and
3 discriminatory treatment of Canfor by the U.S.
4 designed to ensure a predetermined, politically
5 motivated, and results-driven outcome for the
6 purpose of harming Canfor, end quote, and that is
7 found at paragraph seven of Canfor's rejoinder.

8 But how did this treatment supposedly harm
9 Canfor? It allegedly did that through the
10 imposition of the AD/CVD determinations. The
11 imposition of the duties on Canfor is the only way
12 in which Canfor has been treated by the United
13 States, and that is the only way in which it has
14 allegedly been harmed.

15 Canfor, of course, recognizes this, and
16 tellingly the paragraph of Canfor's rejoinder from
17 which I just so quoted cites to its notice of
18 arbitration. If you look at the paragraph in
19 Canfor's notice of arbitration from which I just
20 cited, you will see that the full sentence which
21 Canfor partially quoted states that its claim,
22 quote, arises from unfair, inequitable, and

1 discriminatory treatment of Canfor by the U.S.
2 designed to ensure a predetermined, politically
3 motivated, and results-driven outcome to the
4 investigations resulting in the countervailing
5 duty, preliminary determination, the critical
6 circumstances preliminary determination, the
7 antidumping duty preliminary determination, the
8 countervailing duty final determination, the
9 antidumping duty final determination, and the final
10 determination of the ITC.

11 So, whether or not Canfor wishes to
12 characterize its claims here as antidumping or
13 countervailing duty claims is besides the point.
14 Canfor is challenging the interpretation and the
15 application of the United States's antidumping and
16 countervailing duty laws that resulted in the
17 imposition of the determinations and the duties at
18 issue here. Claims that challenge the
19 interpretation and application of a party's law are
20 necessarily claims that seek to impose obligations
21 with respect to that law. Canfor concedes that its
22 claims arise out of and are connected with

1 antidumping and countervailing duty law. Its
2 arguments that those claims do not impose
3 obligations with respect to the law is at odds with
4 the ordinary meaning of the term "with respect to."
5 Meriam Webster's dictionary, for example,
6 defines the phrase "with respect to," with
7 reference to and in relation to. And that same
8 thesaurus provides the following synonyms for the
9 phrase "with respect to." Apropos, as for, as
10 regards, as respects, as to, concerning, re,
11 regarding, respecting, and touching.

12 The obligations that Canfor seeks to
13 impose on the United States undoubtedly concern
14 U.S. trade law. Canfor has advanced no plausible
15 argument why the term "with respect to" in Article
16 1901(3) should be interpreted in a manner that is
17 inconsistent with its ordinary meaning. There is
18 no sound basis for reading the term "with respect
19 to" more narrowly than any of the terms I just
20 mentioned or any other commonly used synonyms such
21 "as arising out" of or "in connection with."

22 In fact, in most contexts, the term "with

1 respect to" would be understood as broader than the
2 term "arising out of" because that latter term may
3 connote some type of causal connection.

4 Canfor relies principally on the dissent
5 in the Chapter 11 case of Waste Management versus
6 Mexico, and This is the first Waste Management
7 case. It relies on that case for its view that the
8 term "with respect to" has a narrow meaning. As we
9 noted in our written submissions, the majority in
10 that case rejected the dissent's reading of that
11 phrase. Instead, the Tribunal interpreted the
12 phrase "with respect to" in accordance with its
13 ordinary meaning.

14 The question before the Tribunal in that
15 case was what did the phrase, and I quote,
16 "proceedings with respect to a measure," which
17 appears in Article 1121 of the NAFTA, the question
18 was, what does that phrase include? The Tribunal
19 held that proceedings with respect to a measure
20 encompassed proceedings that referred to that
21 measure. It also held that the phrase included
22 proceedings that have a legal basis derived from

1 that measure. Finally, it held that proceedings
2 with respect to a measure include proceedings that
3 have their origin in that measure.

4 Similarly, Canfor's claims are precluded
5 here. They clearly refer to, have a legal basis
6 derived from, and have their origin in antidumping
7 law and countervailing duty law. Moreover, in
8 concluding that the phrase "with respect to" had a
9 narrower meaning than other commonly used synonyms,
10 the dissenting arbitrator in the Waste Management
11 case relied on the fact that the phrase in the
12 French version of the NAFTA had a particular
13 translation, and I would hesitate to speak French
14 in any setting, and I hesitate even more to do so
15 in this particular one, given the constitution of
16 our Tribunal members, so I ask you to literally
17 pardon my French.

18 But the dissenting arbitrator did indeed
19 rely on the fact that the phrase "with respect to"
20 appeared in the French version as "se rapportant
21 a"--

22 PRESIDENT GAILLARD: You passed.

1 MS. MENAKER: Thank you.

2 He opined that this was different than
3 saying that the proceedings related to or concerned
4 the measure.

5 As we noted in our written submissions,
6 however, when describing the function of Article
7 1121, that very same Article that was at issue in
8 the Waste Management case, in its statement of
9 administrative action, the United States said that
10 Article 1121 requires the investor--and in certain
11 cases the enterprise--to waive the right to
12 initiate or continue any actions in local contracts
13 or other fora relating to the disputed measure.

14 Thus, the United States did consider the
15 term "with respect to," as appears in Article 1121
16 to be synonymous with the phrase "relating to."

17 In addition, the dissent failed to note
18 the phrase "with respect to" is not always
19 translated in the same manner in the French version
20 of the NAFTA's text. So, for example, as I
21 previously mentioned, we have the trans--the phrase
22 "with respect to" appears in the French version of

1 the NAFTA's text in Article 1121 as "sa rapportant
2 a." The phrase "with respect to" also appears in
3 Article 1901(3), in the English version of the
4 NAFTA's text. In the French version that, phrase
5 appears as "relativement a."

6 And in Article 1901(1), again, the English
7 version of the NAFTA contains the phrase "with
8 respect to." The French version, however, contains
9 the phrase "au regard des."

10 And in Article 3012, the English version
11 similarly contains the phrase "with respect to,"
12 while the French version of the NAFTA contains the
13 phrase "en ce qui concerne."

14 And finally, we have both Article 2106 and
15 the annex to Article 2106. In the English version,
16 the phrase "with respect to" appears in both the
17 Article and the annex, but in the corresponding
18 French version that phrase appears as "por ce qui
19 concerne" and "en ce qui a trait aux." That
20 concludes my French for the day.

21 So, the same English language term appears
22 as various terms in the French text, indicate the

1 breadth and the flexibility of the term "with
2 respect to," and is further evidence that the NAFTA
3 parties did not ascribe any particularized narrow
4 meaning to the term "with respect to."

5 Finally, Canfor argues that the United
6 States is not entitled to the so-called protection
7 of Article 1901(3) because it argues that the
8 United States's agencies allegedly acted
9 arbitrarily and in bad faith when they issued the
10 determinations. This argument ignores the plain
11 meaning of the term "with respect to" in Article
12 1901(3).

13 According to Canfor, if the determinations
14 were issued in violation of U.S. trade law, then
15 any obligation imposed on the United States
16 concerning that conduct cannot be said to be with
17 respect to its law.

18 The determinations at issue, however, were
19 issued by U.S. Government agencies that applied
20 U.S. AD/CVD law. Whether those agencies properly
21 applied U.S. law is the precise question that the
22 NAFTA parties reserved for Chapter 19 binational

1 panels. If Canfor's interpretation of the phrase
2 "with respect to" AD/CVD's law were accepted, then
3 anytime a Chapter 19 binational panel found a NAFTA
4 party to have violated its obligations under
5 Chapter 19, that party's AD/CVD determinations
6 would then become open to challenge under Chapter
7 11. Chapter 19, however, sets forth the manner in
8 which a party's determinations may be challenged,
9 and the remedies that may be granted when such
10 determinations are found to have been wrongly
11 issued.

12 If a Chapter 19 Panel finds that a party's
13 determinations violated that party's domestic law,
14 the Chapter 19 Panel can remand the determination
15 to the responsible agency. Under Canfor's theory,
16 however, any determination found to have violated
17 domestic law could then become the subject of a
18 challenge under Chapter 11's international law
19 standards and an investor-state arbitration. Such
20 a result cannot be reconciled with the ordinary
21 meaning of the NAFTA provisions or the
22 circumstances surrounding the treaty's conclusion.

1 A finding by a Chapter 19 Panel that the
2 determinations were unlawful under domestic law
3 does not change the fact that the determinations
4 were made with respect to that law.

5 Canfor concedes that its claims arise out
6 of U.S. antidumping and countervailing duty law.
7 Submitting antidumping and countervailing duty
8 determinations taken under authority of that law to
9 investor-state arbitration under Chapter 11 would
10 thus impose obligations on the United States with
11 respect to its antidumping law or countervailing
12 duty law.

13 I will now turn to explain why Canfor is
14 incorrect when it argues the term "antidumping law"
15 or "countervailing duty law" in Article 1901(3)
16 refers only to the substance of the law; that is,
17 the actual piece of legislation, and not to the
18 application of that law in the form of an
19 antidumping or countervailing duty determination.
20 Claims such as Canfor's that assert that the United
21 States misinterpreted and misapplied its
22 antidumping law and countervailing duty law in

1 issuing determinations necessarily impose
2 obligations on the United States with respect to
3 its AD/CVD law. The term "law" in Article 1901(3)
4 incorporates the interpretation and the application
5 of that law by a party. In seeking to separate the
6 interpretation and the application of the law from
7 the law itself, Canfor calls for a reading of the
8 phrase with respect to a party's AD/CVD law that is
9 unsupportable.

10 According to Canfor, Article 1901(3)'s
11 sole function is to prevent provisions in chapters
12 other than Chapter 19 from imposing obligations on
13 a party with respect to the substance of their
14 AD/CVD laws, and I will address this argument in
15 two parts. First, I will demonstrate that the
16 ordinary meaning of the term "antidumping law or
17 countervailing duty law" confirms that this term
18 incorporates a party's application of that law in
19 the form of AD/CVD determinations. And second, I
20 will show that interpreting the phrase antidumping
21 law or countervailing duty law in the manner in
22 which Canfor suggests would frustrate the parties'

1 intent and would render Article 1901(3)

2 ineffective.

3 So, the ordinary meaning of the phrase
4 "antidumping law or countervailing duty law" does,
5 indeed, encompass a party's application of that law
6 in the form of an antidumping or a countervailing
7 duty determination. Canfor appears to argue that
8 the term "antidumping law or countervailing duty
9 law" refers only to the actual statute itself. But
10 this is not the case. As can you see, in Annex
11 1911, the parties defined the terms "antidumping
12 statute" and "countervailing duty statute." For
13 the United States, that terms is defined, or those
14 terms are defined as Section 303 and the relevant
15 provisions of Title VII of the Tariff Act of 1930,
16 as amended, and any successor statutes.

17 The NAFTA parties, however, did not use
18 the term "antidumping statute" or "countervailing
19 duty statute" in Article 1901(3). They used the
20 term "antidumping law or countervailing duty law."
21 And the term "law" in Article 1901(3) is broader
22 than the term's statute.

1 Article 1902(1) which I've also projected
2 on the screen provides that, and I quote--this is
3 from the second sentence in subparagraph one of
4 that Article--Antidumping law and countervailing
5 duty law include, as appropriate for each party,
6 relevant statutes, legislative history,
7 regulations, administrative practice, and judicial
8 precedents, end quote.

9 Antidumping and countervailing duty
10 determinations are examples of administrative
11 practices. Commerce and the ITC administer certain
12 of the United States's trade laws. The manner in
13 which they administer those laws is by conducting
14 investigations and in some cases administrative
15 reviews, and to making antidumping, countervailing
16 duty, and material injury determinations. Those
17 agencies' administrative practices are embodied in
18 the determinations that they make.

19 Thus, the definition of antidumping law or
20 countervailing duty law in Article 1902 confirms
21 that the parties intended to prevent provisions
22 outside of Chapter 19 from imposing obligations on

1 them with respect to their antidumping and
2 countervailing duty determinations.

3 In addition, if the term "law" in Article
4 1901(3) referred only to the substance of the law,
5 then Article 1901(3)'s sole function would be to
6 prevent any provisions outside of Chapter 19 from
7 being construed to impose obligations on a party
8 with respect to the substance of its AD/CVD laws,
9 and this, according to Canfor, is Article 1901(3)'s
10 function. Canfor argues that Article 1901(3)
11 simply prevents provisions outside of Chapter 19
12 from being construed to impose obligations on a
13 party to amend its antidumping or countervailing
14 duty law.

15 Article 1901(3), as can you see, however,
16 uses the term "obligations" without any limitation.
17 By its clear terms, Article 1901(3) thus prohibits
18 the imposition of any obligations on a party with
19 respect to its AD/CVD law. If, as Canfor contends
20 Article 1901(3's) sole function was to prohibit
21 other chapters of the NAFTA from imposing
22 obligations on a party to amend its trade laws,

1 Article 1901(3) would read as follows, and I've put
2 this on the screen as well. (Reading) No provision
3 of any other chapter of this agreement shall be
4 construed as imposing obligations on a party to
5 amend its antidumping or countervailing duty
6 statute. It does not say that, however, and there
7 is no justification for reading those additional
8 terms into Article 1901(3).

9 Finally, the decision on jurisdiction on
10 the UPS versus Canada NAFTA Chapter 11 case
11 comports with the United States's reading. In that
12 case, UPS claimed that Canada had violated Article
13 1105. It alleged that Canada had failed to enforce
14 its goods and services tax in a nondiscriminatory
15 manner. Canada argued that UPS's Article 1105
16 claim was barred by Article 2103, subparagraph one.
17 Article 2301 provides, and I quote, Except as set
18 out in this Article, nothing in this agreement
19 shall apply to taxation measures, end quote.

20 Like Canfor does in this case, UPS argued
21 that Article 2103(1) does did not deprive the
22 Tribunal of jurisdiction because the Article only

1 barred challenges to a tax law, but did not prevent
2 a claimant from challenging the application of that
3 law. UPS withdrew its Article 1105 claim before
4 the Tribunal rendered its decision, but
5 nevertheless the UPS Tribunal confirmed in its
6 award on jurisdiction that it did not have
7 jurisdiction over any claim under Article 1105 by
8 virtue of Article 2103(1).

9 The same principle that applied in the UPS
10 claim--excuse me case--applies here. Interpreting
11 the term "antidumping law or countervailing duty
12 law" in Article 1901(3) to prohibit only the
13 imposition of obligations with respect to the
14 substance of a party's trade law is contrary to
15 that term's ordinary meaning.

16 I will now explain why reading Article
17 1901(3) in such a matter would also frustrate's the
18 parties' intent and would render Article 1901(3)
19 ineffective contrary to accepted principles of
20 treaty interpretation. First, the NAFTA parties
21 may challenge both the substance as well as the
22 application of another party's antidumping or

1 countervailing duty law under Chapter 19. Article
2 1903, for example, provides that a party may
3 challenge the substance of another party's law if
4 that law is amended. Article 1904, however,
5 provides a means for a party to challenge another
6 party's application of its law because it permits
7 challenges to antidumping and countervailing duty
8 determinations.

9 Under Canfor's reading of Article 1901(3),
10 that is, interpreting that Article to apply only to
11 prohibit the imposition of obligations with respect
12 to the substance of a party's AD/CVD law, it would
13 be possible to challenge the application of that
14 law under both Chapters 11 and 19. But then one is
15 forced to ask why would the NAFTA parties have
16 created such a particularized dispute resolution
17 mechanism in Article 1904 to hear challenges to a
18 party's antidumping and countervailing duty
19 determinations?

20 The proceedings set forth in Article 1904
21 provides that domestic law will govern such
22 determinations and that the review is conducted

1 with a high degree of deference to the agency's
2 factual findings and conclusions of law.

3 Chapter 19 also provides that the persons
4 who serve on panels will be sitting or former
5 judges, to the extent practicable. Numerous and
6 detailed rules of procedure are also prescribed in
7 Chapter 19. Why would the parties have gone
8 through the trouble of creating such an elaborate
9 system if the claimant could choose to have its
10 claim heard before a Chapter 11 investor-state
11 Tribunal that would apply Chapter 11's
12 international legal standards in reviewing those
13 same determinations de novo? The obvious answer is
14 that they would not have done so. Yet, Canfor's
15 reading of the term "law" in Article 1901(3)
16 requires one to conclude that the NAFTA parties
17 intended to give claimants the choice of
18 challenging antidumping and countervailing duty
19 determinations under either Chapter 11 or Chapter
20 19 or, indeed, under both chapters as Canfor has
21 done so here. Such a reading is untenable and
22 should be rejected by this Tribunal.

1 Second, the history behind Article
2 1901(3)'s inclusion in the NAFTA also confirms that
3 the Article bars the imposition of obligations from
4 other chapters with respect to the application of a
5 party's antidumping and countervailing duty law.
6 Article 1901(3) did not have a counterpart in the
7 Canada-U.S. Free Trade Agreement, the predecessor
8 agreement to the NAFTA. Canfor asserts that the
9 Article was added to the NAFTA as a technical
10 change to accommodate the addition of Mexico.
11 Canfor, however, does not explain how Article
12 1901(3) carries out this purported technical
13 accommodation.

14 As both the U.S. statement of
15 administrative action and Canada's statement of
16 implementation make clear, the Chapter 19 mechanism
17 that is established in the NAFTA remained
18 essentially unchanged from the mechanism that was
19 in the Canada-U.S. Free Trade Agreement. The
20 Canada-U.S. Free Trade Agreement contained a
21 chapter governing investment, but did not provide
22 for investor-state arbitration. Thus, provisions

1 similar to Article 1901(3) was unnecessary in a
2 Canada-U.S. Free Trade Agreement as only the two
3 state parties had the ability to bring claims under
4 that agreement.

5 Parties, unlike private claimants, have
6 both rights and obligations under the treaty. The
7 parties are well aware of the fact that they agreed
8 to have their AD/CVD determinations subjected only
9 to the obligations set forth in Chapter 19.

10 Although several dozen binational panels have been
11 established under the Canada-U.S. Free Trade
12 Agreement and under the NAFTA, no party has ever
13 argued that obligations contained in chapters
14 outside of the antidumping and countervailing duty
15 chapters should be imposed on another party. This
16 is no surprise. Each NAFTA party knows that such
17 an argument might result in its determinations
18 being subjected to those same obligations. And the
19 NAFTA parties know what they agreed to, and they
20 did not agree to have obligations outside of
21 Chapter 19 imposed on their antidumping and
22 countervailing duty law.

1 With the addition of investor-state
2 arbitration under the NAFTA, the parties sought to
3 make clear that Chapter 19 was the exclusive
4 mechanism within the NAFTA for challenging
5 antidumping and countervailing duty determinations.
6 Article 1901(3) bars private claimants, like Canfor
7 here, from bringing such claims under Chapter 11,
8 and thereby from imposing obligations beyond those
9 in Chapter 19 on a party's antidumping and
10 countervailing duty law.

11 Without recourse to investor-state
12 arbitration under the Canada-U.S. Free Trade
13 Agreement, no such prohibition was deemed
14 necessary.

15 Finally, Canfor's reading of Article
16 1901(3) would render that Article ineffective.
17 Article 1902 is entitled Retention of Domestic
18 Antidumping and Countervailing Duty Law. That
19 Article grants the NAFTA parties the right to amend
20 their antidumping law and countervailing duty law
21 so long as such modifications are done in
22 accordance with the procedures set forth in

1 Chapter 19.

2 And Canfor alleges Article 1902's purpose.

3 In its reply, the paragraph of which I have
4 projected on the screen, it states, and I quote,
5 Article 1902 reserves to the NAFTA parties the
6 right to retain and apply their municipal
7 antidumping laws, but any such change can only
8 occur after the amending party notifies the other
9 parties of the amendment and its application to
10 them, end quote.

11 Canfor also claims, however, and this is
12 also a paragraph from its reply, that Article
13 1901(3) merely ensures the parties' right to
14 maintain antidumping and countervailing duty laws
15 which laws can only be changed within the context
16 of the processes established under that chapter.

17 The right to retain one's law necessarily
18 incorporates the right to be free from obligations
19 to change that law. Canfor's interpretation of
20 Article 1901(3) would make that Article redundant
21 with Article 1902. The NAFTA parties would not
22 have included two articles placed one immediately

1 after the other to perform the same function.
2 Interpreting Article 1901(3) in such a manner runs
3 counter to the Article's ordinary meaning and would
4 render that Article ineffective.

5 In sum, Article 1901(3) is clear that
6 Chapter 19 is the exclusive mechanism under the
7 NAFTA for challenging antidumping and
8 countervailing duty determinations. Those
9 determinations are not subject to review under
10 international legal standards. Whether those
11 determinations conformed with domestic law is a
12 question that is reserved for Chapter 19 Panels.
13 Subjecting antidumping and countervailing duty
14 determinations to investor-state arbitration and
15 reviewing those determinations under Chapter 11's
16 international law rules, would be imposing
17 obligations on the United States from chapters
18 outside of Chapter 19 with respect to its
19 antidumping and countervailing duty laws. Such
20 action is expressly prohibited by Article 1901(3).
21 ARBITRATOR HARPER: Ms. Menaker, if I may,
22 Mr. President.

1 PRESIDENT GAILLARD: Please.

2 ARBITRATOR HARPER: Two questions. First,
3 is it the position of the United States that
4 imposing an obligation, as the term is used in the
5 NAFTA, includes a determination by a tribunal of
6 arbitration that damages should be paid by the
7 United States to an investor like Canfor?

8 MS. MENAKER: Yes. Imposing an obligation
9 on the United States would include--an obligation
10 would be the obligation to pay damages, but even
11 short of that, the obligation to arbitrate in
12 accordance with procedures that are set forth in
13 Chapter 11 is also an obligation that is being
14 imposed on the United States.

15 So, even if this Tribunal were to exercise
16 jurisdiction over Canfor's claims, yet dismiss them
17 on the merits, the United States would have still
18 been subjected to an obligation. An obligation
19 still would have been imposed on us with respect to
20 our AD/CVD laws.

21 ARBITRATOR HARPER: My second question
22 relates to the Byrd Amendment which is drawn in the

1 question in paragraphs 141 and following of the
2 Statement of Claim, and in this connection let me
3 ask you whether the position of the United States,
4 or whether what is the position of the United
5 States with respect to the Byrd Amendment in this
6 arbitration, taking note of the fact that in
7 footnote 17 of page 13 of the Rejoinder on
8 Jurisdiction by Canfor, Canfor takes the position
9 that the Byrd Amendment cannot be construed as a
10 part of the antidumping law or countervailing duty
11 law, safeguarded under Article 1901(3) because the
12 Byrd Amendment violated the obligation of the
13 United States not to amend its antidumping and
14 countervailing duty law.

15 So, what is the position of the position
16 of the United States? Is the Byrd Amendment a
17 antidumping measure or a countervailing duty
18 measure that is or is not within the meaning of the
19 1901(3)?

20 MS. MENAKER: Exercising jurisdiction over
21 Canfor's claim which includes a challenge to the
22 Byrd Amendment would also impose an obligation on

1 the United States that is with respect to its
2 antidumping and countervailing duty law. With
3 regard to the footnote in Canfor's rejoinder from
4 which you just quoted, Canfor appears to be making
5 the same argument that if a--whether it be the WTO
6 or a Chapter 19 Panel, if they find that the United
7 States violated its law, then any action taken by
8 the United States cannot be said to have been taken
9 with respect to that law. And that we contend is
10 at odds with the ordinary meaning of the term "with
11 respect to."

12 In the same manner, in some instances, the
13 Chapter 19 Panels that are reviewing the
14 antidumping and countervailing duty determinations
15 and the material injury determinations have
16 disagreed with the United States's interpretation
17 of its own law and has remanded those
18 determinations back to the responsible agencies.
19 That doesn't make that action that was taken by the
20 agencies any less of an action that was taken by
21 them in interpreting and applying their own law,
22 and any obligation imposed on the United States

1 with respect to that action would still be with
2 respect to our law.

3 I would also just note that the Byrd
4 Amendment, Canfor has not explained precisely in
5 what manner it is challenging the Byrd Amendment or
6 how the Byrd amendment has allegedly harmed them.
7 It is an undisputed fact that the duties that have
8 been collected on softwood lumber have not yet been
9 liquidated, so those duties have not been sent out
10 to any of the domestic lumber producers.

11 So, as far as we can see, the only
12 allegation that Canfor can be making with respect
13 to the Byrd amendment is that the piece of
14 legislation itself actually provided an improper
15 incentive for the domestic industry to support the
16 petitions that were made to Commerce and the ITC to
17 initiate their investigations. And as we noted in
18 a footnote to our reply, the decision to initiate
19 an investigation and the manner in which that
20 investigation is conducted is an integral part of
21 applying your antidumping and countervailing duty
22 law. So, the decision by the Commerce Department,

1 for instance, to instigate its antidumping duty
2 investigation cannot be separated from the
3 determination that it ultimately issued, which is
4 really the subject of Canfor's complaint.

5 PRESIDENT GAILLARD: Ms. Menaker, before
6 we move on, can you take your slides at page 18, or
7 if you have a set.

8 MS. MENAKER: Yes.

9 PRESIDENT GAILLARD: This is your argument
10 like the Canfor's interpretation would add language
11 to the Article 1901(3).

12 Are your two arguments, like you say, it
13 would have to be read like with the language to
14 amend on the one hand and saying statute on the
15 other hand? Are your two arguments independent, or
16 is it the same argument, or only one argument?

17 MS. MENAKER: I apologize. Can you repeat
18 that question.

19 PRESIDENT GAILLARD: You have underlined
20 two modifications which, in your view, would be
21 necessary to follow Canfor's approach to 1901(3).
22 Are you making two arguments or only one combined

1 argument?

2 MS. MENAKER: They are related arguments,
3 but what Canfor is saying is that 1901(3) only
4 provides protection for a party from being
5 compelled by provisions outside of Chapter 19 to
6 change its law. And our understanding is when
7 they're talking about the law, they're only talking
8 about the actual legislation. So, if that reading
9 were correct or that interpretation was correct,
10 then the argument is that the Article would have to
11 have used the term "statute," which is a defined
12 term referring specifically to the statutes as
13 opposed to the broader term "law." Because once
14 you include the term "law," it includes everything
15 that's in 1902. I think I understand a little
16 better your question because of course--

17 PRESIDENT GAILLARD: My question is, if
18 you accept that it's not statute but is law, do you
19 still need to add the word "amend" to be right if
20 you are Canfor?

21 MS. MENAKER: If you wouldn't mind, if I
22 can just think about that over the next break and

1 get back to you.

2 PRESIDENT GAILLARD: That's perfectly
3 fine.

4 I have another question, and then we have
5 other questions. Can you take your presentation at
6 page 19--I'm sorry, 20. That's the duplication
7 argument. So, you say, well, if their
8 interpretation of 1901(3) is right, it's completely
9 duplicative with 1902.

10 Would accept an interpretation which would
11 say 1902 is the principle and 1901(3) says, well,
12 what we have secured in 1902 cannot be modified
13 implicitly by reference to other chapters, so it's
14 a belt-and-suspenders approach? I'm not saying we
15 buy this argument. We certainly will hear on the
16 other side also, but what do you have to say to
17 that kind of argument at this stage? Or do you
18 prefer to keep it for the discussion?

19 MS. MENAKER: I don't think that that
20 argument is a tenable one. I don't think that that
21 is a common practice in drafting treaty provisions.
22 A belt-and-suspenders argument sometimes will work

1 when the parties indicate that for greater clarity
2 they're going to say something that is redundant
3 from what has been previously said or where a
4 portion of a provision overlaps in its effect with
5 another provision. But here, what you would be
6 accepting would be that any time the NAFTA parties
7 retained for themselves a right or undertook an
8 obligation that you would in essence be expecting
9 to find a corollary, another provision that
10 basically said and nothing else in this agreement
11 shall be construed to affect that right we observed
12 or obligation that we have undertaken, and that
13 seems to be redundant and certainly is not the way
14 in which we have seen treaties being drafted, and
15 we have seen no other such example in the NAFTA for
16 instance.

17 PRESIDENT GAILLARD: Thank you. Of
18 course, on this we will hear claimants, but I don't
19 think we'll do it now. We will do it in the normal
20 course of conduct.

21 Now, Professor Weiler has a question also.

22 ARBITRATOR WEILER: Have you actually

1 finished your presentation?

2 PRESIDENT GAILLARD: But Mr. McNeill has.

3 ARBITRATOR WEILER: Has Ms. Menaker

4 finished her presentation?

5 MS. MENAKER: I have.

6 ARBITRATOR WEILER: So, could you just go

7 over again with me, there is one point I'm not

8 clear on your position. What actually would define

9 the limit of this that which would be AD and CVD on

10 the American position? Is it anything that is

11 taken in the course of the proceedings before

12 Commerce, for example, the ITC? What if they did

13 something that even the United States court, if it

14 were in another context a binational panel declared

15 they were acting outside the jurisdiction, they

16 were acting with no authority to act in that way,

17 and yet it was part of those proceedings? Would

18 that still be AD/CVD in the sense of your argument

19 and shielded from any other, for example, remedy

20 under NAFTA, even if it caused damage to an

21 investor? I mean, is there any material limit? Or

22 is it simply because it was done in that kind of

1 procedure?

2 PRESIDENT GAILLARD: Ms. Menaker, you can
3 obviously answer now, but that's the type of issues
4 we would like to address in greater depth tomorrow
5 afternoon. I'm not saying you shouldn't ask it
6 now. It's good for us to flag questions and that's
7 the type of questions we want to address maybe in
8 more depth tomorrow afternoon. But maybe you could
9 answer preliminarily, if you want.

10 MS. MENAKER: Sure, if you would like me
11 to maybe answer in a short manner and then
12 elaborate more either tomorrow afternoon or
13 Thursday, I would be happy to do that.

14 Of course, answering this in a
15 hypothetical manner without actually having
16 hypothetical facts is somewhat difficult, but
17 certainly if it--if what we are talking about are
18 factual findings and legal conclusions that the
19 agencies made that were part and parcel of their
20 determinations, then that is action if challenged
21 would impose an obligation with respect to the
22 United States's AD/CVD law.

1 One could imagine situation where an
2 agency took a decision that they really didn't have
3 authority to take. They did something that was
4 outside of their jurisdiction, or maybe they even
5 acted in a manner that did not provide a right for
6 someone to respond or something along those lines
7 that would normally be subject to a court review.

8 But those types of issues are precisely
9 what the Chapter 19 Panel mechanism reviews. The
10 Chapter 19 Panel is--has to apply domestic trade
11 law, so certainly if one of the agencies did
12 something where they clearly were acting outside
13 the scope of their authority, the Chapter 19 Panel,
14 in applying U.S. trade law, would then make that
15 determination and remand it. So, that would not
16 take that conduct outside of 1901(3), so to speak,
17 and subject it to investor-state arbitration, or
18 arbitration in any other forum, because that
19 conduct still would have been taken with respect to
20 the implementation and application of the U.S.
21 trade laws.

22 PRESIDENT GAILLARD: Thank you. Again, I

1 guess that's a note for both parties, the type of
2 issues with precise examples. Maybe I suggest you
3 both on both sides you think of examples outside of
4 this case. That's not to say, well, in this case
5 this and that, but take like in the law school
6 approach, you know, take hypotheticals which are
7 not real, but to make the point, and both sides
8 would like to hear about around those issues. That
9 is an issue of interest for the Tribunal.

10 Thank you. How long--is that a good time
11 for a pause, or how long do you want to continue?
12 We still have two people to speak on behalf of the
13 U.S.

14 MR. McNEILL: I'm at the Tribunal's
15 pleasure. I will go about 30 or 40 minutes.

16 PRESIDENT GAILLARD: And then
17 Mr. Bettauer?

18 MR. BETTAUER: Another 10 minutes beyond
19 then, so if you would like, this would be a fine
20 time for a break. We'll be done in another 40 to
21 50 minutes after the break.

22 PRESIDENT GAILLARD: Maybe I don't think

1 we want to start respondent's side this morning
2 anyway, so maybe it's a good time to have a what,
3 you want, 10 or 15 minutes break? Let's meet at
4 half past, half past 11. I'm sorry, my watch does
5 not say the same thing as the World Bank's watch.
6 Let's meet in 13 minutes.

7 (Brief recess.)

8 PRESIDENT GAILLARD: We go back to the
9 record, and it's for Mr. McNeill to continue the
10 presentation on the U.S. side. Thank you,
11 Mr. McNeill.

12 MR. MCNEILL: Thank you. Good morning,
13 Mr. President, members of the Tribunal.

14 You heard from Ms. Menaker how Article
15 1901(3) by its plain terms deprives this Tribunal
16 jurisdiction over Canfor's claims. I will now
17 demonstrate that Article 1901(3)'s context and the
18 NAFTA's object and purpose confirm that the NAFTA
19 parties did not consent to arbitrate Canfor's
20 antidumping and countervailing duty claims under
21 the investment chapter.

22 Rather, the context, object, and purpose

1 of the treaty demonstrate that the parties intended
2 the specialized binational panels in Chapter 19 to
3 have exclusive jurisdiction under the NAFTA over
4 antidumping and countervailing duty claims.

5 I will begin by addressing Article
6 1901(3)'s context and demonstrate why certain arms
7 in the NAFTA, including Article 2004 and the
8 provisions for the use of business proprietary
9 information in the binational panel proceedings,
10 confirm that Chapter 19 was intended to be the
11 exclusive mechanism under the NAFTA for challenging
12 antidumping and countervailing duty
13 claims--determinations, excuse me.

14 I will then address the object and purpose
15 of the NAFTA and demonstrate how Canfor's attempt
16 to submit under Chapter 11 the same claims it
17 litigated in Chapter 19 is inconsistent with the
18 treaty's objective of promoting effective dispute
19 resolution.

20 To begin with, Article 31 of the Vienna
21 Convention on the Law of Treaties, provides that a
22 treaty must be interpreted in accordance with the

1 ordinary meaning to be given to the terms of the
2 treaty in light of their context and in light of
3 its object and purpose. Paragraph two of that
4 Article provides that the relevant context includes
5 the treaty's text, its preamble and annexes, and
6 any related agreements or instruments.

7 The first element of the NAFTA's context I
8 will examine is Article 2004. That Article
9 demonstrates the NAFTA parties' intent, that the
10 binational panels be the exclusive forum for
11 antidumping and countervailing duty disputes.

12 Chapter 20 governs disputes between the
13 NAFTA parties. Article 2004 describes Chapter 20's
14 broad jurisdiction. It provides the dispute
15 settlement provisions of this chapter shall apply
16 with respect to all disputes between the parties
17 regarding the interpretation or application of this
18 agreement or wherever a party considers that an
19 actual or proposed measure of another party is or
20 would be inconsistent with the obligations of this
21 agreement.

22 Significantly, the only subject matter

1 Article 2004 specifically mentions as being outside
2 of Chapter 20's jurisdiction are those, quote,
3 matters covered in Chapter 19, review and dispute
4 settlements in antidumping and countervailing duty
5 matters. The NAFTA parties excluded obligations
6 with respect to their antidumping and
7 countervailing duty laws, even from the broad
8 dispute settlement mechanism in Chapter 20 because
9 they established in Chapter 19 a specialized
10 mechanism for resolving such disputes. As provided
11 in the United States statement of administrative
12 action, which was issued contemporaneously with the
13 entry into force of the NAFTA, quote, Chapter 20
14 does not apply to disputes arising under Chapter
15 19, however, which sets out specific mechanisms for
16 dispute resolution in antidumping and
17 countervailing duty cases.

18 The mechanism for challenging antidumping
19 and countervailing duty determinations is found in
20 Article 1904, which is on the screen. Under
21 paragraph two of that Article, the NAFTA parties
22 can request that a panel review a final antidumping

1 or countervailing duty determination. And under
2 paragraph five, private claimants can challenge
3 antidumping and countervailing duty determinations.
4 Both NAFTA parties and private claimants are
5 precluded from challenging final antidumping and
6 countervailing determinations outside of Chapter 19
7 because Article 1904 sets forth a specialized
8 binational panel mechanism for both NAFTA parties
9 and the private claimants to challenge such
10 determinations.

11 Thus, the NAFTA's context, as reflected in
12 Article 2004 and 1904, confirms what Article
13 1901(3) plainly says, that binational panels
14 exclusively govern challenges under the NAFTA to a
15 party's antidumping and countervailing duty
16 determinations.

17 Now, Canfor does not contest that private
18 claimants can invoke the binational panel
19 mechanism. In fact, Canfor did so with respect to
20 the final determinations at issue in this case.
21 And Canfor concedes that Article 2004 precludes
22 NAFTA parties from challenging antidumping and

1 countervailing duty determinations outside of
2 Chapter 19. Rather, what Canfor argues is that
3 private claimants can also submit determinations to
4 arbitration under the NAFTA's investment chapter.
5 If that were true, however, it would result in
6 private claimants having far broader rights to
7 challenge antidumping and countervailing duty
8 determinations than the NAFTA parties themselves.
9 That result would make no sense, and would be far
10 broader scope for state-to-state dispute resolution
11 in the NAFTA, and as I will demonstrate, in light
12 of the absence of any express authority that would
13 be required to submit such claims to investor-state
14 arbitration.

15 Chapter 20, as I demonstrated applies to
16 all subject matters in the NAFTA, except where
17 specifically excluded. Chapter 11, on the other
18 hand, confers limited jurisdiction over investment
19 disputes. Article 1116 and 1117, which is
20 projected on the screen, provides that an investor
21 may submit to arbitration under the section of
22 claim that another party has breached an obligation

1 under Section A of Chapter 11 or two provisions in
2 Chapter 15.

3 As the Supreme Court of British Columbia
4 stated in Mexico versus Metalclad, quote, The right
5 to submit a claim to arbitration is limited to
6 alleged breaches of an obligation under Section A
7 and to two Articles contained in Chapter 15. It
8 does not enable investors to arbitrate claims in
9 respect of alleged breaches of other provisions in
10 the NAFTA, end quote.

11 Now, where the NAFTA parties intended
12 Chapter 11 obligations to apply to matters covered
13 in other chapters of the NAFTA, they made that
14 intention clear by incorporating the relevant
15 provisions of Chapter 11 directly into the chapter
16 in question.

17 For example, the financial services
18 chapter expressly incorporates some of the
19 substantive obligations in Chapter 11 as well as
20 the investor-state mechanism of Chapter 11.
21 Article 1401, paragraph two, provides, Articles
22 1115 through 1138, which is the investor-state

1 dispute resolution mechanism in Chapter 11, are
2 hereby incorporated into and made a part of this
3 Chapter solely for breaches by a party of Articles
4 1109 through 1111, 1113, and 1114.

5 Article 1401 demonstrates the very
6 deliberate means the NAFTA parties used to apply
7 the substantive obligations, and the investor-state
8 dispute resolution mechanism to matters arising
9 under other chapters in the NAFTA. Thus, for
10 example, a private claimant could submit a claim to
11 investor-state arbitration, alleging that a party's
12 measures expropriated its financial services
13 investment in violation of Article 1110. But it
14 could not bring a claim alleging that the same
15 measures violated the national treatment obligation
16 in 1102 or the minimum standard of treatment
17 obligation in 1105 because those obligations are
18 not expressly incorporated into Chapter 14.

19 Rather, such claims could be brought only
20 by a NAFTA party under Chapter 20.

21 In Fireman's Fund versus Mexico, for
22 example, the NAFTA Tribunal, considering the effect

1 of Article 1401 stated, quote, Article 1102 on
2 national treatment and Article 1105 on the minimum
3 standard of treatment are not incorporated into
4 Chapter 14. Accordingly, if the measures at issue
5 are covered by Chapter 14, this Tribunal lacks
6 jurisdiction over the claims under Articles 1102
7 and 1105, and indeed, the Tribunal dismissed the
8 claims on that basis.

9 Likewise, the Chapter 19 does not
10 incorporate, expressly or otherwise, any of the
11 substantive obligations contained in Chapter 11,
12 nor the investor-state dispute resolution
13 mechanism, confirms that the NAFTA parties did not
14 intend to subject such matters to Chapter 11
15 arbitration.

16 Now, there is a significant commonality
17 between Chapter 11 and Chapter 14. Chapter 11
18 applies to investments generally, and Chapter 14
19 applies to investments in financial services. If
20 Chapter 11 obligations applied to subject matters
21 in other chapters outside of Chapter 11, as Canfor
22 suggests, one might expect to--that they would

1 apply to the investments in financial services in
2 Chapter 14 because of this commonality. That the
3 NAFTA parties thought it necessary expressly to
4 incorporate those obligations into Chapter 14,
5 suggests they did not intend Chapter 11 obligations
6 to apply to other chapters in the NAFTA in the
7 absence of a similar provision expressly
8 incorporating the obligations of Chapter 11, such
9 as Chapter 19, which does not address investments.

10 This conclusion is reinforced by the
11 exclusion of all antidumping and countervailing
12 duty matters from the broader dispute resolution
13 mechanism in Chapter 20. The decision of the
14 Chapter 11 Tribunal in UPS versus Canada supports
15 this conclusion. The Tribunal in that case
16 considered the effect of Article 1501(3), which is
17 projected on the screen, which provides that,
18 quote, No party may have recourse to dispute
19 settlement under this agreement for any matter
20 arising under this Article.

21 The Tribunal concluded based on this
22 provision that, quote, NAFTA authorizes a broader

1 scope for state-state arbitration than for
2 investor-state arbitration and nowhere confers
3 express authorization to bring claims respecting
4 Article 1501 under investor-state proceedings. The
5 natural inference then would be that there is no
6 jurisdiction under Chapter 11.

7 In other words, the Tribunal concluded
8 that the exclusion of competition law matters from
9 Chapter 20 necessarily implies their exclusion from
10 Chapter 11.

11 First of all, because of Chapter 20's
12 broader scope, in other words, if the NAFTA were to
13 give private claimants the right to submit to
14 investor-state arbitration, the subject matter in
15 another chapter that could not be subject to
16 state-to-state dispute resolution, and there is no
17 such example in the NAFTA, it would be expressly
18 stated.

19 Second of all, it necessarily implies the
20 exclusion from Chapter 19 because of the absence of
21 any express authority to submit such matters to
22 Chapter 11 arbitration, and that is what the UPS

1 Tribunal found.

2 Likewise, the exclusion of antidumping and
3 countervailing duty matters from Chapter 20 and the
4 absence of express authority to submit such claims
5 to investor-state arbitration, confirms that the
6 NAFTA parties did not intend or consent to have
7 antidumping or countervailing duty claims subject
8 to Chapter 11 arbitration.

9 Now, Canfor argues that allowing private
10 claimants to submit antidumping and countervailing
11 duty claims to arbitration under Chapter 11 would
12 not confirm broader dispute resolution rights with
13 respect to antidumping and countervailing duty
14 matters. Rather, according to Canfor, private
15 claimants and NAFTA parties would simply have
16 different bundles of rights.

17 The chart on the screen illustrates why
18 that argument does not comport with reality. This
19 chart compares the rights and remedies that are
20 available under Chapter 19, which is in the column
21 on the left, and those that would accrue to private
22 claimants if Canfor's argument were accepted, and

1 that appears in the left-hand column.

2 Now, the chart not only will show that
3 private claimants would have far broader rights
4 than NAFTA parties, it also illustrates the
5 anomalous situation that would result under
6 Canfor's theory.

7 First, the binational panel mechanism in
8 Chapter 19 is exclusive. It ensures claimants have
9 only one forum for antidumping and countervailing
10 duty claims. Under Canfor's interpretation of the
11 NAFTA however, private claimants would be accorded
12 two fora to challenge the same final
13 determinations. Canfor offers no explanation as to
14 why the NAFTA parties would have accorded private
15 claimants two fora when they limited themselves to
16 one forum to challenge such matters. Nor is there
17 any conceivable reason why the parties would have
18 subjected themselves to the risks and burden of
19 defending multiple proceedings with respect to the
20 same measure.

21 Second, only final antidumping and
22 countervailing duty determinations can be

1 challenged under Chapter 19. As Mr. Clodfelter
2 noted, the Court of International Trade has
3 jurisdiction only over final antidumping and
4 countervailing duty determinations because Chapter
5 19 Panels stand in the shoes of that court, Chapter
6 19 Panels likewise have jurisdiction only over
7 final determinations.

8 Under Canfor's interpretation of the NAFTA
9 however, private claimants could also challenge
10 preliminary antidumping and countervailing duty
11 determinations under Chapter 11. Again, Canfor
12 offers no explanation why the NAFTA parties would
13 have accorded private claimants alone this right
14 that does not exist under Chapter 19, and does not
15 even exist in U.S. court.

16 Third, Chapter 19 Panels are required to
17 apply the antidumping and countervailing duty laws
18 of the importing party. The NAFTA parties required
19 that their determinations be reviewed under their
20 domestic law because they could not agree to apply
21 an international body of law to those
22 determinations. Under Canfor's interpretation,

1 however, claimants could also subject those
2 determinations to the international law standards
3 in Chapter 11. Canfor's interpretation would thus
4 impose on the NAFTA parties an agreement they could
5 not, and did not, reach.

6 Finally, Chapter 19 Panels must apply the
7 domestic law standard of review. When reviewing
8 determinations made by the U.S. Department of
9 Commerce or the International Trade Commission, for
10 example, the Court of International Trade must
11 apply the substantial evidence standard. Under
12 that standard, the court must defer to the agency's
13 reasonable statutory interpretations and may not
14 substitute its own judgment for that of the
15 agency's or engage in de novo review, even if it
16 would have reached a different conclusion.

17 The Chapter 19 Panels are required to
18 apply the same standard of review as would the
19 Court of International Trade. As the U.S.
20 Statement of Administrative Action notes, strict
21 adherence by the binational panels to that standard
22 is, quote, the cornerstone of the binational panel

1 process. Article 1904(13) of the NAFTA provides
2 that a binational panel that fails to apply the
3 correct standard of review will, per se, be
4 considered to have manifestly exceeded its powers,
5 authority, or jurisdiction.

6 Under Canfor's theory, however, private
7 claimants could not only challenge determinations
8 before the binational panels, they could also seek
9 review of those same determinations de novo under
10 Chapter 11. It would make no sense for the parties
11 to have insisted that the binational panels apply
12 the same deferential standard of review that is
13 applied in U.S. courts, but permit Chapter 11
14 tribunals to review their agencies' legal and
15 factual findings de novo.

16 In sum, as you can see from this chart,
17 Canfor's interpretation would clearly accord
18 broader rights to private claimants than to NAFTA
19 parties with respect to antidumping and
20 countervailing duty matters. Private claimants
21 would have all the rights and remedies that parties
22 have in their Chapter 19, plus the rights and

1 remedies available under Chapter 11. That result
2 would defy the purpose of having created the
3 binational panel mechanism in the first place, and
4 as I demonstrated, it would be contrary to the
5 general scheme of the NAFTA as supported by the UPS
6 and Fireman Fund's decisions that presumes a
7 broader jurisdiction for state-to-state proceedings
8 and requires express authority for Chapter 11's
9 obligations to apply to matters outside of that
10 chapter. Rather, the NAFTA parties created the
11 specialized binational panels in Chapter 19 to be
12 the exclusive forum for antidumping and
13 countervailing duty disputes for both NAFTA parties
14 and private claimants such as Canfor.

15 Now, after having conceded that Article
16 2004 is a clear exclusion, Canfor changes its
17 position in its rejoinder submission, yet argues
18 there that the NAFTA parties would have the same
19 rights as private claimants under Chapter 11.
20 Canfor states, and I quote from that submission,
21 Nothing under NAFTA Article 2004 precludes a state
22 from advancing the same claims brought by Canfor in

1 the independent exercise of the state's rights for
2 an alleged violation of NAFTA Chapter 11.

3 In other words, Canfor contends that
4 because NAFTA parties can bring claims based on the
5 substantive obligations in Chapter 11, NAFTA
6 parties can use that chapter to sidestep the
7 binational panels.

8 This argument is flawed for two reasons.
9 First, Canfor wrongly assumes a yes answer to the
10 very question raised in the United States objection
11 to jurisdiction; namely, whether antidumping and
12 countervailing duty claims are subject to Chapter
13 11 arbitration in the first place.

14 Second, while it is true that NAFTA
15 parties can submit claims with respect to the
16 substantive obligations in Chapter 11, they can do
17 so only under the mechanism in Chapter 20 which
18 includes Article 2004's exclusion for all
19 antidumping and countervailing duty matters.

20 Contrary to Canfor's assertion, Chapter 11
21 does not provide private claimants or NAFTA parties
22 a back door to evade the binational panel mechanism

1 in Chapter 19.

2 Canfor also argues that if the United
3 States's interpretation of Article 1901(3) were
4 correct, there would have been no need for Article
5 2004 because Article 1901(3) applies to all other
6 provisions in the treaty. That argument is also
7 unsound.

8 Article 2004 does not suggest that the
9 exclusion in Article 1901(3) is limited in scope.
10 To the contrary, it underscores that exclusion.

11 For example, in the UPS case, the claimant
12 made a similar argument that there would have been
13 no need for note 43 of the NAFTA which clarifies
14 that competition law is excluded from Chapter 11
15 arbitration if Article 1501 accomplished that task.
16 The Tribunal rejected that argument, concluding
17 that any redundancy between note 43 and Article
18 1501 simply, quote, evidenced the drafters'
19 caution. This Tribunal, likewise, should reject
20 Canfor's argument.

21 Moreover, Article 2004 reflects a common
22 drafting method for at least two of the NAFTA

1 parties. As can you see from the text of the
2 Canada-U.S. Free Trade Agreement which is on the
3 screen. Article 1701 of that agreement, which is
4 in the financial services chapter, provides that,
5 quote, No other provision of this agreement confers
6 rights or imposes obligations on the parties with
7 respect to financial services, end quote.

8 Now, that Article prevents a party under
9 the Canada-U.S. Free Trade Agreement from
10 submitting claims with respect to financial
11 services to state-to-state dispute resolution.
12 Article 1801 of that treaty, which is in the
13 state-to-state dispute resolution chapter, provides
14 that, quote, except for the matters covered in
15 Chapter 17, Financial Services, the provisions of
16 this chapter shall apply with respect to the
17 settlement of all disputes. That Article 1801
18 reflects the exclusion in Article 1701 does not
19 somehow limit or render ineffective that exclusion.

20 To the contrary, like Article 2004, it
21 underscores its importance to the parties.

22 Finally, Canfor argues that had the NAFTA

1 parties intended to exclude antidumping and
2 countervailing duty matters from Chapter 11, they
3 would have included in that chapter a provision
4 similar to Article 2004. Canfor points to Article
5 1103(1) which provides that Chapter 11 does not
6 apply to financial services matters as the type of
7 provision that would have been included. This
8 argument is backwards.

9 Canfor's reliance on Article 1101(3) is
10 inapt for several reasons. First, the financial
11 services chapter, as I demonstrated, incorporates
12 specific substantive obligations of Chapter 11 and
13 the investor-state dispute resolution mechanism of
14 Chapter 11 into that chapter. Article 1101(3)
15 clarifies that the list of Chapter 11 obligations
16 that are incorporated into Chapter 14 is
17 exhaustive. Chapter 19, in contrast, does not
18 incorporate any Chapter 11 obligations, and no
19 similar exclusion would thus be necessary.

20 In fact, as I demonstrated, it is the
21 absence of any similar incorporation of Chapter 11
22 obligations in Chapter 19 that confirms that no

1 jurisdiction exists for Canfor's claims.

2 Second, as I mentioned, unlike Chapter 14,
3 which applies to investors and their investments in
4 financial services, Chapter 19 does not, on its
5 face, apply to investments. It addresses
6 antidumping and countervailing duty matters. Thus,
7 there is no basis to assume that investor-state
8 arbitration would even apply to antidumping and
9 countervailing duty matters in the first place.

10 Finally, unlike Chapter 14, Chapter 19
11 contains an express exclusion that applies to all
12 other chapters in the NAFTA. No additional
13 exclusion is needed in Chapter 11 to bar Canfor's
14 claims. In sum, Article 1901(3)'s context, as
15 reflected in Articles 2004, 1904, and 1401 confirms
16 that the NAFTA does not confer jurisdiction on
17 Chapter 11 tribunals with respect to antidumping
18 and countervailing duty claims such as Canfor's.

19 Another aspect of the NAFTA's context that
20 confirms Chapter 19's exclusive jurisdiction over
21 antidumping and countervailing duty matters are the
22 provisions relating to the use of

1 business-proprietary information in binational
2 panel proceedings. In its antidumping and
3 countervailing duty investigations, the Department
4 of Commerce often gathers business-proprietary
5 information from companies that are subject to the
6 investigations. That information includes prices,
7 product costs, and customer lists. To protect that
8 information from disclosure to the subject
9 company's competitors and others, U.S. law
10 restricts its dissemination. Only Department of
11 Commerce and International Trade Commission
12 personnel who are directly involved in the
13 investigations at issue are permitted to have
14 access to the proprietary information.

15 As can you see on the screen, provisions
16 are made in the NAFTA for the use and protection of
17 proprietary information in Chapter 19 Panel
18 proceedings. Annex 1904(15) to the NAFTA provides,
19 quote, the United States shall amend its laws to
20 provide for the disclosure to authorized persons
21 under Protective Order of proprietary information
22 in the administrative record if binational panel

1 review of a final determination is requested.

2 The U.S. Tariff Act was amended
3 accordingly at the time of entry into force with
4 the NAFTA. It provides that, quote, If binational
5 panel review of a determination under this subtitle
6 is requested pursuant to Article 1904 of the NAFTA,
7 Commerce or the ITC, as appropriate, may make
8 available to authorized persons under a Protective
9 Order a copy of all proprietary materials in the
10 administrative record.

11 Authorized persons as defined in that
12 provision include the binational panel members,
13 counsel, and their respective support staff. No
14 corresponding provision is found in the NAFTA or
15 under U.S. law for proprietary information to be
16 used in arbitration under Chapter 11.

17 Thus, neither the Tribunal nor counsel in
18 these proceedings have access to proprietary
19 information contained in the administrative records
20 to the determinations at issue. Indeed, the use of
21 such proprietary information in these proceedings
22 would result in the strict--the imposition of

1 strict penalties under U.S. law. This confirms the
2 NAFTA parties did not contemplate or consent to the
3 submission of antidumping or countervailing duty
4 disputes to Chapter 11 arbitration. Had the
5 parties intended to confer jurisdiction on Chapter
6 11 tribunals to review antidumping and
7 countervailing duty determinations, they would have
8 ensured those tribunals had access to the
9 information necessary to carry out their functions.

10 Furthermore, without access to proprietary
11 information in the administrative record, it would
12 be impossible for this Tribunal to decide all of
13 Canfor's claims on the merits. For example, in its
14 notice of arbitration, Canfor alleges that
15 Commerce, quote, did not properly allocate joint
16 costs by allocating costs based only on differences
17 in grade and not differences in value attributable
18 to dimension or length.

19 Commerce's cost allocation, however, was
20 based on a comparison of proprietary pricing
21 information from the companies subject to the
22 investigation. On the screen is a page from the

1 Department of Commerce's brief in the Chapter 19
2 antidumping proceeding. Commerce explains how it
3 compared the prices from the subject companies and
4 found no pricing pattern attributable to length--to
5 the length of the softwood lumber.

6 Now, this page is somewhat blurry.
7 Perhaps I would refer you to the hard copy, page
8 15, and I will just point out a few items on this
9 page. First, you will notice it says in the upper
10 right-hand corner, proprietary information removed.

11 Here, the Department of Commerce is
12 explaining the basis for its inclusion that there
13 is no significant correlation between the size of
14 lumber and lumber prices. You can see in the
15 second line of that paragraph it says, As
16 demonstrated in Exhibit A to this brief, pricing
17 evidence does not show a consistent trend that
18 larger or wider dimensions always demand a higher
19 price. For example, in the case of, and then as
20 you see, the pricing information that Commerce
21 relied on has been redacted from this page. You
22 see at bottom of the page it refers to an exhibit,

1 and the information in that exhibit is also
2 redacted.

3 Now, this Tribunal would have no access to
4 the redacted pricing information. Without
5 reviewing that proprietary information, it would be
6 impossible for this Tribunal to sit in judgment of
7 Commerce's cost allocation determination as Canfor
8 asks it to do. Nor could the United States, for
9 that matter, even respond to these allegations,
10 since the State Department does not have access to
11 this information, either.

12 I will now demonstrate that the object and
13 purpose of the NAFTA also confirm the NAFTA party's
14 intent to establish Chapter 19 as the exclusive
15 forum for antidumping and countervailing duty
16 disputes. NAFTA Article 102 provides the
17 objectives of this agreement as elaborated more
18 specifically through its principles and rules are
19 to create effective procedures for the resolution
20 of disputes, end quote.

21 A review of the NAFTA's various dispute
22 resolution provisions also demonstrates an

1 overriding concern with promoting effective dispute
2 resolution. Article 1121, for example, provides
3 that as a condition precedent to submitting a claim
4 under Chapter 11, an investor must waive its
5 rights, quote, to initiate or continue before any
6 administrative Tribunal or court under the law of
7 any party, or other dispute settlement procedures,
8 any proceedings with respect to the measures of the
9 disputing party that is alleged to be a breach
10 referred to in Article 1116.

11 Article 1121 reflects the parties' intent
12 to deny claimants the ability to pursue claims for
13 damages with respect to the same measures in two
14 fora. As the Tribunal in the Chapter 11 Waste
15 Management case stated, quote, When both legal
16 actions have a legal basis derived from the same
17 measures, they can no longer continue
18 simultaneously in light of the imminent risk that
19 the claimant may obtain the double benefit of its
20 claim for damages. This is precisely what NAFTA
21 Article 1121 seeks to avoid.

22 Where the NAFTA parties intended to allow

1 for two proceedings with respect to the same
2 measures to continue simultaneously, the treaty
3 specifically provides for such. Article 1121, for
4 example, does not require claimants to waive their
5 right to pursue injunctive or declaratory relief in
6 a domestic administrative Tribunal's or the courts
7 of a party.

8 Article 1115 of the NAFTA provides that
9 the arbitral mechanism in Section B of Chapter 11
10 is, quote, without prejudice to the rights and
11 obligations of parties under Chapter 20, end quote.

12 As the United States noted in its reply
13 submission, this Article simply reflects the
14 international law principle that a private claimant
15 cannot waive the rights of a state to submit a
16 claim on behalf of its national. It does not
17 sanction the submission of antidumping and
18 countervailing duty claims to Chapter 11
19 arbitration.

20 Submitting the same determinations to
21 dispute resolution under two chapters of the NAFTA
22 would not be consistent with the NAFTA's objective

1 of promoting effective dispute resolution for
2 several reasons. First, relitigating the findings
3 of fact and law made by the binational panels based
4 on tens of thousands of pages of administrative
5 records would be a waste of resources.

6 Second, as the Waste Management Tribunal
7 noted, parallel proceedings risk double recovery.
8 As can you see on the screen, the Chapter 19
9 countervailing duty in a Chapter 19 countervailing
10 duty proceeding Canfor seeks, quote, the
11 return/refund of all estimated duty deposits.
12 Likewise, in its notice of arbitration in this
13 case, Canfor alleges as an element of its damages,
14 quote, duties paid or to be paid.

15 Finally, assuming jurisdiction over this
16 case would risk producing conflicting findings of
17 fact and law. For example, the Chapter 19 Panel in
18 the countervailing duty case affirmed Commerce's
19 finding that Canadian provincial stumpage practices
20 constitute a financial contribution that is
21 specific to an industry. In this arbitration,
22 however, Canfor alleges that Commerce, quote,

1 failed to provide any reasonable analysis in
2 determining that provincial stumpage programs are a
3 financial contribution.

4 In other words, Canfor asks this Tribunal
5 to render a decision that is directly at odds with
6 that made by the Chapter 19 binational panel.

7 Conflicting decisions by different
8 tribunals with respect to the same claims by the
9 same parties under the same treaty would not be
10 consistent with the goal of effective dispute
11 resolution. Canfor's argument that the United
12 States has selectively focused on only one NAFTA
13 objective and has ignored those pertaining to the
14 liberalization of trade is without merit. It
15 cannot be said that denying Canfor the chance to
16 submit under Chapter 11 the same claims it already
17 litigated in Chapter 19 would somehow advance the
18 treaty's goals of promoting free trade.

19 Canfor also argues that the binational
20 panel proceedings have not been effective, and that
21 an effective resolution of its claims requires it
22 to have access to Chapter 11. Canfor's

1 dissatisfaction with the outcome of the Chapter 19
2 proceedings, however, does not confer jurisdiction
3 over Canfor's claims in this case. Chapter 11 is
4 not an appellate body for Chapter 19.

5 Finally, Canfor contends that submitting
6 the same claims to Chapter 11 and to Chapter 19
7 simultaneously would actually promote effective
8 dispute resolution and would not result in
9 conflicting judgments because the two chapters
10 apply different sets of laws. This argument is
11 legally and factually unsound.

12 First, the NAFTA parties consented to
13 subject their antidumping and countervailing duty
14 determinations to review only under their domestic
15 laws. That Chapter 11 applies international law
16 standards is not a reason to grant Canfor a second
17 forum for its claims. To the contrary, as I
18 explained previously, it is one reason why there is
19 no jurisdiction in this case over those claims.

20 Second, contrary to Canfor's assertion,
21 Canfor does seek review of antidumping and
22 countervailing duty determinations under U.S. law

1 standards in this proceeding, as are applied in
2 Chapter 19 proceedings. For example, as you see on
3 the screen, in the Chapter 19 countervailing duty
4 proceeding, Canfor alleged that, quote, Commerce's
5 refusal to calculate a company-specific subsidy
6 rate for Canfor constituted a clear violation of
7 U.S. law.

8 Likewise, in its notice of arbitration in
9 this proceeding, Canfor alleges that the Department
10 of Commerce determined that there was no right to
11 an individual subsidy rate, quote, despite clear
12 United States law to the contrary.

13 Similarly, before the Chapter 19
14 countervailing duty panel, Canfor alleged that the
15 Department's standing determination was, quote,
16 contrary to U.S. law. In this arbitration, Canfor
17 alleges that Commerce failed to determine that the
18 petition was filed on behalf of the U.S. industry,
19 quote, as required by United States law.

20 Again, in the Chapter 19 countervailing
21 duty panel proceedings, Canfor alleged that
22 Commerce's quote, reliance on out-of-country

1 benchmarks is contrary to U.S. law. Similarly, in
2 this arbitration, Canfor alleges that Commerce
3 applied in-country benchmarks, quote, in total
4 disregard of requirements of United States law.

5 Finally, in the Chapter 19 countervailing
6 duty proceeding, Canfor alleged that the
7 Department's conclusion that stumpage programs
8 constituted a benefit was, quote, contrary to U.S.
9 law. Similarly, in this arbitration, Canfor
10 alleges that Commerce failed to provide any
11 reasonable analysis for its finding that stumpage
12 programs were a financial contribution, quote, in
13 violation of respondent's domestic law.

14 In sum, Canfor's argument that it makes
15 different claims under different laws in two NAFTA
16 proceedings and that there is, therefore, no risk
17 of conflicting findings, is untrue. Relitigating
18 the same claims Canfor submitted to the binational
19 panels would not promote the effective resolution
20 of disputes. Rather, dismissing Canfor's claims
21 has required under the plain terms of the NAFTA
22 would be consistent with that objective.

1 In conclusion, Article 1901(3)'s context
2 and the object and purpose of the NAFTA are fully
3 consonant with the plain meaning of Article
4 1901(3), and demonstrate beyond question the NAFTA
5 parties' intent to preclude the claims that Canfor
6 submits in this arbitration. That concludes my
7 remarks, I would be pleased to take any questions.

8 PRESIDENT GAILLARD: Thanks, Mr. McNeill.
9 Before we hear Mr. Bettauer on the following of the
10 argument of the U.S. side, we may have a few
11 questions. I have a couple of questions, and my
12 co-arbitrators may have questions, being understood
13 that answer only the clarification part of the
14 question, and you may want to discuss tomorrow
15 afternoon or at a later stage the questions, and of
16 course it's also a signal for the other side of
17 what we are interested in.

18 If you go to your slide which
19 discusses--would you go to your slide 10--I'm
20 sorry, no--yes, your slide 10 which discusses
21 Article 1501 of the NAFTA and note 43, it's in the
22 context of your answer to the argument, according

1 to which Article 2004 would be rendered duplicative
2 or irrelevant by the U.S. interpretation of
3 1901(3), and you say, well, look at UPS, they said
4 that footnote or note 43 was not--was a mere
5 clarification. Would you agree with me that here
6 it's the belt-and-suspenders approach?

7 MR. McNEILL: Yes I think that's a fair
8 characterization, that the inference that Canfor
9 seeks to draw here is that if Article 1901(3)--if
10 our interpretation of Article 1901(3) were correct,
11 then there would have been no need for Article 2004
12 because 1901(3) applies to the entire treaty.

13 PRESIDENT GAILLARD: And you say sometimes
14 there is no need, but it's clearer in spelling it
15 out, and therefore look at what happened with note
16 43 and 1501. It was a clarification as discussed
17 in UPS, and sometimes the treaty does feel the need
18 to spell out things which would, in a certain
19 interpretation, go without saying.

20 So, you agree with me that it's a belt and
21 suspender here? It may happen.

22 MR. McNEILL: It's a clarification, and

1 also I would argue it emphasizes the importance of
2 the parties that someone who's reading the NAFTA
3 gets it right. That's particularly the case here
4 with Article 2004.

5 Now, Article 2004 could have been drafted
6 any number of ways. You will notice it says,
7 except as otherwise provided. And it could have
8 not mentioned Chapter 19.

9 PRESIDENT GAILLARD: I'm not suggesting
10 it's determinative of anything. I'm just
11 clarifying the position and your views on this.

12 MR. MCNEILL: Yes, the analogy is that
13 this was belt and suspenders. Article 2004 was
14 belt and suspenders but it also serves other
15 purposes as well. I think it emphasizes the
16 importance of the exclusion 1901(3), and it's also
17 a matter of drafting convenience. If it just said
18 as otherwise provided, you would have to search
19 through the entire NAFTA to determine what was, in
20 fact, not covered.

21 PRESIDENT GAILLARD: It adds clarity and
22 guidance to the users of NAFTA, which is not easy,

1 so the drafters wanted to make easier and clearer
2 in certain respects.

3 MR. McNEILL: That's correct.

4 PRESIDENT GAILLARD: I understand your
5 answer. Of course we will hear, not now, but the
6 other side's determination on these type of issues
7 in due course this afternoon.

8 Now, my second question to you has to do
9 with the waiver. If you go to your slide 17, I'm
10 also referring to the footnote 105 of page 28 of
11 your first brief, which is the objection to
12 jurisdiction of respondent United States of America
13 dated October 16, 2003. It's page 28, footnote
14 105.

15 MR. McNEILL: Okay.

16 PRESIDENT GAILLARD: That's where you
17 discuss the same type of argument.

18 I understand the argument in the context
19 of the legal argument. You're saying look, it's
20 what it means. You take the requirement of the
21 waiver, and you discuss it in the context of what
22 you want to show in terms of interpretation. Now,

1 if you look at footnote 105, it seems to go a
2 little further, and it says, Canfor's purported
3 waiver under 1121 is therefore arguably
4 ineffective. I understand the argumentative part
5 of the footnote which is more or less what you said
6 this morning, and this morning it was completely
7 clear. I understand this footnote to be to the
8 same effect, like it's an argument, and you're not
9 making the technical claim that Canfor's waiver
10 under 1121 is, indeed, invalid, and that, in and of
11 itself, is a ground for denying Canfor's claim or
12 standing or whatever the consequences of that would
13 be because the language is substantive. It's
14 arguably ineffective. So I would like a
15 clarification of the position of the U.S. in this
16 respect.

17 Is the U.S. making the case that the
18 waiver is ineffective and therefore that's an
19 additional ground we have to decide on, or is it
20 just in the context of the argument that we should
21 take this argument into account to follow your line
22 of reasoning, which I believe I understand

1 perfectly well?

2 But, as--you don't have to answer now, but
3 at some point this is one of the questions I want
4 to ask because we have to know on what we need to
5 decide at this stage. To me, subject to your
6 clarification, it's not a separate ground. It's
7 part of the argument, but if it is, I would like
8 you to clarify that, and certainly we want the
9 other side to elaborate and announce their answer
10 on this particular aspect. Again, maybe you can
11 answer now, maybe you want to answer later. Either
12 way is fine with me, but by the end of this
13 three-day hearing we want a determination on that.

14 MR. McNEILL: I think the United States
15 will aver to you with a fuller answer tomorrow. I
16 can tell you that the United States is not making a
17 jurisdictional objection on this basis.

18 PRESIDENT GAILLARD: On a stand-alone
19 basis.

20 MR. McNEILL: At this time. We reserved
21 our right to make other jurisdictional objections,
22 and that's what the footnote is about. We are not

1 making the objection at this time.

2 PRESIDENT GAILLARD: Thank you for your
3 clarification. Again for all of these issues,
4 Canfor will have an opportunity to elaborate their
5 position.

6 Now, my co-arbitrators?

7 ARBITRATOR HARPER: Thank you,
8 Mr. President.

9 PRESIDENT GAILLARD: Mr. Harper.

10 ARBITRATOR HARPER: Mr. McNeill, let me
11 draw your attention to Article 1112 of the NAFTA,
12 and I want to know whether it's the position of the
13 United States that there is any inconsistency
14 between Chapter 11 and Chapter 19.

15 MR. MCNEILL: No. On the face of the text
16 there is no inconsistency. The two chapters
17 perform different functions. They each have
18 dispute resolution mechanisms that handle different
19 types of claims, so there is no inconsistency
20 between the two chapters. The only point we made
21 in our brief was that if you took antidumping and
22 countervailing duty claims, which the NAFTA

1 specifies are supposed to be resolved in a very
2 specific way in a very specific forum, and you
3 submitted those claims to Chapter 19 and Chapter 11
4 simultaneously, that that in itself would give rise
5 to critical inconsistencies that would have to be
6 resolved in favor of Chapter 19.

7 ARBITRATOR HARPER: And so, if I'm to
8 understand you correctly, the U.S. position,
9 returning to your slide nine, which lists rights
10 and remedies under Chapter 19 in one column and
11 rights and remedies sought by Canfor in the other,
12 is it the position of the United States that that
13 chart illustrates what would be an inconsistency as
14 applied as between Chapters 11 and 19?

15 MR. MCNEILL: Again, well, yes, in a sense
16 that this would be an example, and again the
17 inconsistency arises from how these types of
18 disputes are intended to be resolved, and the two
19 proceedings have entirely different mechanisms for
20 resolving disputes. Chapter 19 has five panelists
21 that are drawn from the two countries involved in
22 the proceeding. Chapter 11 has three arbitrable

1 members. They have completely different
2 proceedings.

3 And this list, in fact, could be far
4 longer. For instance, in the Chapter 19
5 proceeding, it's basically an appellate proceeding,
6 and it's supposed to mimic the Court of
7 International Trade, which is also an appellate
8 court, and it's supposed to limit its review to the
9 administrative record. When you submit the claims,
10 these claims to Chapter 11, you no longer have this
11 restriction. There is the possibility of
12 discovery, and that was not something that the
13 NAFTA parties contemplated or consented to. And
14 that would yet be another inconsistency that would
15 arise if you submitted these claims to these two
16 chapters.

17 PRESIDENT GAILLARD: Professor Weiler.

18 ARBITRATOR WEILER: I just to repeat what
19 the Chairman said that what I'm about to ask is for
20 my purposes clarification, but you may want to take
21 it just as flagging an issue that would be
22 interesting for me if you came back to. It's a

1 very tentative question. And also as the Chairman
2 in his question says, the answer is not necessarily
3 injurious to your position.

4 I was trying to work out as you were
5 outlining your argument and also before in reading
6 the briefs how would the NAFTA investor compare to
7 a non-NAFTA investor in a similar situation? And I
8 just want to understand, if I understood your
9 position correctly, actually the NAFTA investor
10 would be in a situation which is inferior to
11 non-NAFTA investors because, on the assumption and
12 that, of course, might be a contestable assumption
13 that there might be aspect of antidumping and
14 countervailing duty law which actually would
15 violate the international law equivalent to 1105.

16 So, a non-NAFTA investor would have his or
17 own remedy before the United States authorities,
18 instead of going before a binational panel which is
19 just a substitute for the Court of International
20 Trade, they would go directly to the Court of
21 International Trade and could appeal to an appeals
22 court rather than to the extraordinary challenge

1 under the NAFTA. But then their country could
2 still bring independently of that or if there was
3 no adequate relief in either of their countries,
4 there could be a normal claim in international law
5 for protection of an alien, assuming that standard,
6 et cetera, whereas you said that if I understood
7 you correctly, that a NAFTA state would not even be
8 able to bring a claim because it would go on the 20
9 and 20 makes envois to 19 and say you are not
10 allowed to use 20, you have to go to 19.

11 So if I understood it all correctly, it
12 might be that the NAFTA investor is actually in a
13 position inferior to a normal investor.

14 Maybe another hypothesis comparing a NAFTA
15 investor to an investor that would be covered by a
16 standard bilateral investment treaty, that investor
17 would seem to be in a position better than a NAFTA
18 investor because there would not be the bar to
19 bringing a claim which was contemporaneous.

20 Now, as I said, it's not necessarily
21 injurious to your case. That might have been what
22 the parties wanted. That's how they wrote the

1 NAFTA. But still would be useful for me if that
2 point was clarified.

3 PRESIDENT GAILLARD: In fairness, it may
4 be the type of questions you wish to reflect on,
5 and we would understand completely if you were to
6 answer tomorrow afternoon. Certainly we want an
7 answer to that during the course of this three-day
8 hearing, but not necessary on this part.

9 MR. McNEILL: I think we will, in fact,
10 reflect on that and give you a response.

11 ARBITRATOR WEILER: Can I pose two other
12 questions?

13 PRESIDENT GAILLARD: Absolutely. That
14 doesn't mean we don't ask the questions now. It
15 gives you more time to think, and it's all the
16 better.

17 MR. McNEILL: In the same spirit with the
18 two caveats that I made before, I would find it
19 useful, and maybe this would have been a question
20 which I would have better posed to Mr. Clodfelter,
21 if one could compare actual remedies, not what
22 Canfor is requesting the way you did, which was

1 very helpful and for which I'm very grateful, but
2 what are the type of remedies that a Chapter 19
3 process can end up compared to the remedies that
4 Chapter 11 can provide? And is there total overlap
5 or are there gaps between the two? In other words,
6 are there types of injuries that could be suffered
7 as a result of a violative antidumping law
8 countervailing duty, a remedy for which could be
9 given by Chapter 19 and not by Chapter 11 or vice
10 versa? Again, it's not necessarily today.

11 The final question, if I may.

12 PRESIDENT GAILLARD: Certainly, please.

13 Go ahead.

14 ARBITRATOR WEILER: And that I should have
15 posed maybe to Ms. Menaker before, so I apologize
16 if I didn't. I take you back to your reference to
17 the definition part of what is covered by Chapter
18 19, that it's not statute, and there was a future
19 reference in that definition, any practice,
20 et cetera, now or in the future. I'm speaking from
21 memory, but am I right? I think I am.

22 MS. MENAKER: Are you talking about the

1 definition of statute when it says as amended, or
2 the definition of antidumping law and
3 countervailing duty law?

4 ARBITRATOR WEILER: Definition of
5 antidumping and countervailing duty law.

6 MS. MENAKER: It's--perhaps if I just read
7 it, it says, include as appropriate for each party
8 relevant statutes, legislative history,
9 regulations, administrative practice, and judicial
10 precedents.

11 ARBITRATOR WEILER: Maybe it was then the
12 definition of the statute which made a reference to
13 future statutes?

14 MS. MENAKER: I think that's correct.
15 That's Title VII, as amended, and any--in fact, let
16 me just quote it accurately.

17 ARBITRATOR WEILER: I apologize for being
18 inaccurate.

19 MS. MENAKER: Let me note also in Article
20 1904(2), from which the sentence that I just
21 previously read, it also says, solely for purposes
22 of the panel review, provided for in this Article,

1 the antidumping and countervailing duty statutes of
2 the parties are those statutes, the word "that" is
3 missing, but that may be amended from time to time
4 and incorporated into and made a part of this
5 agreement, which conforms with the definition of
6 antidumping and countervailing duty statute in
7 Annex 1911 because it refers to the statutes as
8 amended and any successor statutes.

9 ARBITRATOR WEILER: So here comes my
10 question, not maybe exactly for now but for
11 reflection, as a flagging question. Assume that
12 one of the parties amends the antidumping law in a
13 way that compromises some other NAFTA provisions.
14 They expand it or--what remedies are available to
15 the other NAFTA parties to challenge such an
16 amendment? Would they not be shielded and simply
17 said you have to go--is my understanding correctly
18 that the U.S. position is because it would be a
19 dispute about an antidumping measure, it would have
20 to be under Chapter 19, and it couldn't be, for
21 example, under Chapter 20?

22 PRESIDENT GAILLARD: I think it goes for

1 the same treatment. Both parties are invited to
2 elaborate on this in due course. Maybe a short
3 answer now, but we would like an elaboration, and
4 also time to answer follow-up questions. I mean,
5 it's opening up a whole host of questions, I guess.
6 I would like to have time to address that properly.

7 MS. MENAKER: Sure. Perhaps I could give
8 a short answer now, and I would be happy to
9 elaborate further, but Article 1903 is drafted for
10 that express purpose. What Chapter 19 does when it
11 went into effect, the parties brought their--they
12 were permitted to retain their antidumping and
13 countervailing duty laws, and they were permitted
14 to amend them, as they saw fit.

15 Now, if a party believes that another
16 party has amended their laws in such a manner that
17 it causes them harm or it's inconsistent with what
18 the parties agreed to subject their antidumping and
19 countervailing duty laws to, the remedy for that is
20 in Article 1903 which is entitled Review of
21 Statutory Amendments, and it provides that a party
22 to which an amendment of another party's

1 antidumping or countervailing duty statute applies,
2 you may request in writing that such amendment be
3 referred to a binational panel for declaratory
4 opinion as to whether it conforms with the
5 provisions set forth in Chapter 19.

6 So, I think clearly if a party amended
7 their countervailing duty law in a manner which
8 unsettled another party, it would still be
9 prevented by virtue of Article 1901(3) and 2004
10 from bringing that complaint before any other forum
11 under the NAFTA.

12 PRESIDENT GAILLARD: If I may, it goes a
13 little further, I guess, the question, because it
14 goes to the labeling argument, what if sheer
15 expropriation is labeled competition, not
16 antidumping or countervailing duty laws. So that's
17 something I don't want to address now, but I want
18 an explanation from both parties on that kind of
19 issue later on in the course of this hearing. If
20 you understand what I mean. I guess you do.

21 So if not, we will ask more specific
22 questions, but Joseph, is that all at this stage?

1 ARBITRATOR WEILER: Thank you very much.

2 PRESIDENT GAILLARD: Conrad, is that all?

3 ARBITRATOR HARPER: Yes.

4 PRESIDENT GAILLARD: So at this stage, it
5 concludes our questions to Mr. McNeill.

6 Mr. Bettauer, you want to pick up on this?

7 MR. BETTAUER: Mr. President, members of
8 the Tribunal, I'm pleased to appear before you
9 today to close the United States's first round
10 presentation. I would like to step back for a
11 moment and look at the broader perspective. What
12 are Canfor's claims in this case about? If you
13 look at Canfor's notice of arbitration and
14 statement of claim, you can see that its claims
15 exclusively concern preliminary and final
16 determinations made by the Department of Commerce
17 and the International Trade Commission on Canadian
18 softwood lumber antidumping and countervailing duty
19 petitions. Those determinations all concern the
20 importation of softwood lumber. So, the Canfor
21 claim relates solely to trade. The claim really
22 has nothing--nothing--to do with any measure or

1 treatment of a Canfor investment in the United
2 States. Indeed, all of the allegations focus on
3 actions subject to review by binational panels
4 under Chapter 19.

5 Chapter 11 was meant to forward NAFTA's
6 objective of increasing opportunities for
7 cross-border investment by establishing a
8 dispute-settlement mechanism that allows investors
9 to challenge measures involving investment when
10 they believe such measures are not consistent with
11 the rules in Section A of Chapter 11. It was not
12 meant to deal with disputes that are purely trade
13 disputes. It was not meant to deal with
14 antidumping or countervailing duty matters.

15 In his introduction, Mr. Taft said
16 Canfor's pursuit of the claims here is an abuse of
17 Chapter 11. This is true not only because the
18 claims are expressly excluded from Chapter 11, but
19 also because the claims are not even investment
20 claims to begin with.

21 Now, the United States could make many
22 arguments based on the provisions of Chapter 11 to

1 show that Canfor's claims fail, but as the
2 President pointed out at the beginning of this
3 morning's session, and as both parties agreed,
4 those arguments will not be made at this hearing,
5 but are reserved. So, we focus on why Chapter 19
6 precludes this claim.

7 We have shown that Chapter 19 is the
8 exclusive mechanism for dealing with antidumping
9 and countervailing duty matters, that it is a very
10 specialized mechanism, and that it is the only
11 avenue available for Canfor for this dispute, and
12 it is an avenue Canfor has taken. It is, indeed, a
13 party to Chapter 19 proceedings now in which it
14 makes the very same allegations, the same
15 allegations that it makes now in a Chapter 11
16 proceeding.

17 But Canfor cannot be allowed to succeed in
18 turning its Chapter 19 complaint into a Chapter 11
19 claim. This isn't what the NAFTA parties agreed
20 to, and it isn't what the NAFTA text provides.
21 Article 1901(3) of the NAFTA makes that clear. The
22 NAFTA parties did not consent to arbitrate

1 antidumping and countervailing duty claims under
2 Chapter 11. We have demonstrated this by reviewing
3 for you in some detail the terms of Article 1901(3)
4 in their context, and in light of NAFTA's object
5 and purpose as well as analogous precedent of other
6 NAFTA Arbitral Tribunals.

7 Now, Canfor has argued that the Chapter 19
8 mechanism has proved ineffective. Even if this
9 were true, this is not a reason to find
10 jurisdiction where there is none. Chapter 11 is
11 not a review mechanism for Chapter 19. And to say
12 that Chapter 19 mechanism is ineffective is simply
13 not true. Those procedures are continuing, and
14 there is absolutely no basis for this Tribunal to
15 sit in judgment of a Chapter 19 binational panel.
16 We have shown that Canfor's arguments are
17 completely without merit and that it has no basis
18 to bring this claim. We therefore ask the Tribunal
19 to dismiss Canfor's claims in their entirety.

20 One has to ask why was this case brought?
21 We do not question that Canfor feels aggrieved. It
22 had every right to participate in the Chapter 19

1 binational panel proceeding to seek to vindicate
2 its position. But it most certainly did not have
3 every right to bring a Chapter 11 proceeding based
4 on a contorted reading of the NAFTA, a reading so
5 far removed from reasonableness that this Tribunal
6 should not tolerate it. To tolerate such claims
7 would be an invitation for every company that feels
8 aggrieved to contort the NAFTA to allow it to bring
9 a Chapter 11 claim, no matter how far removed the
10 claim is from being covered by Chapter 11.

11 It is, of course, understandable that a
12 claimant may think we have a shot at winning. We
13 have a shot at winning a Chapter 11 claim, so let's
14 try to turn our claim into a Chapter 11 claim. But
15 this Tribunal should not let that claimant think we
16 have nothing to lose.

17 Mr. President, members of the Tribunal,
18 that's why the Tribunal should award costs in this
19 case. Allowing frivolous claims creates undue
20 burdens on the NAFTA governments. It exacts
21 funding and staffing costs. Ultimately it can
22 undermine support of the governments and the public

1 for the NAFTA. In this case, Chapter 19 clearly
2 provides that no other chapter of the NAFTA is to
3 impose obligations on a party with respect to
4 antidumping and countervailing duty matters.
5 Requiring the United States to defend this case has
6 already imposed obligations on the United States.
7 We have expended significant financial and personal
8 resources to litigate this claim. This includes
9 our preparation of submissions for this Tribunal as
10 well as the burdensome search we were forced to
11 undertake in responding to Canfor's discovery
12 request for the negotiating history of various
13 chapters of the NAFTA, all of which are relevant to
14 Canfor's claim.

15 Under Article 40, paragraph one of the
16 UNCITRAL Rules, and I quote, The costs of the
17 arbitration shall, in principle, be borne by the
18 unsuccessfully party, closed quote. Canfor chose
19 to arbitrate under this rule. In the present case,
20 Canfor has disregarded the express language of the
21 NAFTA which bars its claim and proceeded on the
22 basis of frivolous arguments. As I just said, the

1 Tribunal should not tolerate this and the
2 consequences it may bring. The United States
3 submits that the Tribunal should dismiss Canfor's
4 claims, and award the United States full costs.

5 Mr. President, members of the Tribunal,
6 that concludes the United States's first round
7 presentation. Thank you for your attention.

8 PRESIDENT GAILLARD: Thank you very much,
9 Mr. Bettauer. I see that we are a little bit
10 behind schedule, but that's because of the
11 questions, so you have respected your time, and we
12 have used maybe half an hour of questions.

13 At what time, Mr. Landry? It's up to you.
14 At what time would you like to resume? We were
15 supposed to break at 12:30 and resume at two. Do
16 you want to resume at 2:30, or do you still want to
17 be back, for instance, I guess 2:15 would be fine?
18 We are at your disposal. It doesn't matter for us.

19 MR. LANDRY: 2:15 would be fine.

20 PRESIDENT GAILLARD: 2:15 would be fine?
21 It's fine for respondent as well? So, we will
22 resume--the meeting is adjourned. We'll resume at

1 2:15. Thank you.

2 (Whereupon, at 12:53 p.m., the hearing
3 was adjourned until 2:15 p.m., the same day.)

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1 AFTERNOON SESSION

2 PRESIDENT GAILLARD: We resume our
3 meeting. It's 2:30. We are a little late, but you
4 will have all the time you need this afternoon to
5 make your presentation.

6 So who starts on respondent's side?
7 Mr. Landry?

8 OPENING STATEMENT BY COUNSEL FOR CLAIMANT

9 MR. LANDRY: Thank you, Mr. President.

10 Mr. President, both Mr. Mitchell and I
11 will be dealing with Canfor's argument in the oral
12 submissions and in relation to certain questions we
13 may call upon Professor House to answer some
14 portions of it. I assume that would be okay from
15 the Tribunal's perspective.

16 PRESIDENT GAILLARD: Absolutely. You can
17 do what you want and have people speak whenever you
18 feel appropriate. It's your call. I mean, this
19 afternoon is yours.

20 MR. LANDRY: Thank you.

21 I would first like to just ensure that the
22 panel has before it material that I will be

1 referring to because I do not have a PowerPoint
2 presentation, so if we could just take a moment to
3 get the material before you so that we don't switch
4 and change during the submissions, I will be
5 referring to the four memorials that have been
6 filed, both the two by the U.S. and the two by
7 Canfor.

8 I will also be referring to the three
9 volumes of authorities that Canfor filed, two
10 volumes with the original reply and one with the
11 rejoinder.

12 PRESIDENT GAILLARD: Will you need the
13 documents which were distributed to us this morning
14 by respondent?

15 MR. LANDRY: No.

16 PRESIDENT GAILLARD: We could put that
17 aside for the time being?

18 MR. LANDRY: Yes.

19 MS. MENAKER: Excuse me, I apologize for
20 interrupting, but it doesn't appear that either of
21 our two LiveNote feeds are working.

22 PRESIDENT GAILLARD: Maybe Mr. Kasdan can

1 take care of that.

2 (Pause.)

3 PRESIDENT GAILLARD: Thank you. I
4 understand now that the technical problem has been
5 taken care of, so, Mr. Landry, if you would like to
6 resume. And I confirm that we have the--in front
7 of us all the pleadings, including the notice of
8 arbitration, and we have one set of all of the
9 exhibits, but for the Tribunal we have only one set
10 for the Tribunal, so if you would take your time
11 when you refer us to certain documents, we will
12 tell you when we are ready.

13 MR. LANDRY: And I assume that you do have
14 a copy, obviously, of the Statement of Claim
15 available.

16 PRESIDENT GAILLARD: Yes.

17 MR. LANDRY: One last item, Mr. President,
18 is that I have handed up what I have called a
19 Canfor Corporation handout, a two-page document,
20 which is really nothing more than just an ease of
21 reference for the Tribunal on various Articles both
22 within NAFTA and the Vienna Convention that I will

1 be referring to in my oral submissions.

2 PRESIDENT GAILLARD: We have received it,
3 and I take it it's equally true for the respondent?
4 Can respondent confirm that?

5 MR. BETTAUER: Yes.

6 PRESIDENT GAILLARD: For the record.

7 MR. BETTAUER: Yes. Thank you,
8 Mr. President, we have it.

9 MR. LANDRY: Now, Mr. President, in
10 general, our oral submissions will be dealt with
11 under the following general topics. Firstly, I
12 will be deal with an overview from Canfor's
13 perspective of the interpretive enterprise that
14 this panel must undertake; and then secondly, I
15 then intend to have a fairly detailed discussion of
16 the two key elements that are essential backdrop to
17 that interpretive exercise, those being the actual
18 NAFTA objectives, and secondly the context within
19 which Article 1901(3) is found within the NAFTA.
20 Then thirdly, I will respond to a number
21 of issues raised by the United States, including
22 these matters, in relation to how the United States

1 dealt with the context issue in their objection.

2 Secondly, regarding the issues raised in
3 relation to parallel proceedings, more particularly
4 concerns raised by the U.S. relating to redundancy
5 and the possibility of conflicting judgments. And
6 also the U.S. argument on the circumstances of
7 conclusion of the NAFTA.

8 That will effectively be the main part of
9 the presentation that I will be presenting to you
10 today, and then Mr. Mitchell will then look in
11 detail at what Canfor says is their proper
12 interpretation of Article 1901(3) in light of the
13 context within which Article--the Article is found,
14 and in light of obviously the NAFTA's object and
15 purpose.

16 And then finally Mr. Mitchell will end
17 with some closing remarks.

18 Now, both the parties appear to agree that
19 the starting point for the interpretive exercise
20 that the Tribunal must undertake begins with
21 Article 1101 of the NAFTA which mandates the
22 Tribunal to decide the issues in accordance with

1 international law which, of course, leads to
2 Article 31 of the Vienna Convention. A related
3 Article in NAFTA is Article 102, which helps to
4 inform that interpretive exercise. Both of those
5 are referred to on page one of the handout.

6 Now, although the parties agree as to the
7 starting point, the approach taken as to how the
8 Tribunal must undertake its interpretive exercise
9 is quite different. In our submission, the
10 approach taken by the United States is deficient in
11 two material respects which I will come to in a
12 moment.

13 Just looking at the handout, as the
14 Tribunal is aware, the Vienna Convention Article 31
15 embodies the customary international law relating
16 to the interpretation of treaties, but it
17 highlights the key elements when interpreting a
18 treaty like the NAFTA. Firstly, it must be
19 interpreted in good faith. Secondly, it must be
20 interpreted in accordance with the ordinary
21 meanings of the terms of the treaty in their
22 context which includes, specifically includes in

1 Article 31, the text of the treaty, the preamble,
2 and the annexes. And finally, it must be
3 interpreted in the light of the treaty's object and
4 purpose.

5 And, of course, a similar approach is
6 mandated under the NAFTA under Article 102(2) which
7 states that the parties, in interpreting the NAFTA,
8 must do so obviously in light of its objectives,
9 the objectives being specifically articulated in
10 that Article, and also in accordance with rules of
11 international law which obviously incorporates the
12 Vienna Convention.

13 Therefore, although there is no doubt that
14 the Tribunal must focus on the ordinary meaning of
15 the words in the NAFTA, it must do so taking into
16 account two important principles: It must only do
17 so in the context of the provisions which it is
18 interpreting, which we say requires in this case a
19 rigorous review of the NAFTA and more specifically
20 the provisions of Chapter 11 and Chapter 19 and the
21 interrelationship between them. It must also take
22 into account, as I've said, the object and purpose

1 of the NAFTA, and we say that once the objects and
2 purpose are identified, the Tribunal must interpret
3 the relevant provisions of the NAFTA in a manner
4 which promotes rather than inhibits the objectives
5 of NAFTA.

6 Now, as can be seen from our written
7 arguments, in our submission, the United States
8 analysis in this respect is deficient in two
9 material respects: Firstly, although the United
10 States gives lip service to the need to look at the
11 object and purpose of NAFTA, it simplistically
12 focuses on one objective, and that is the objective
13 to create effective procedures for the resolution
14 of disputes while ignoring other key objectives
15 which are important to the Tribunal's exercise,
16 interpretive exercise.

17 Secondly, the United States argument fails
18 to fully develop the context within which Article
19 1901(3) must be interpreted, and as a result it
20 fails to critically analyze the nature and purpose
21 of, and the fundamental differences between,
22 Chapters 11 and 19, the rights and duties that they

1 establish, and the different legal regimes they
2 describe when such an analysis is of utmost
3 importance to the Tribunal's interpretive exercise.

4 In Canfor's submission, it's only once
5 that context is properly reviewed, and the objects
6 and purposes of NAFTA are more thoroughly
7 articulated that any conclusion can be reached as
8 to the improper interpretation of Article 1901(3).

9 So, the balance of this part of my oral
10 submissions I will take some time to review in
11 detail those two key issues which, as we have seen,
12 as contemplated by Article 31 of the Vienna
13 Convention, forms the necessary backdrop for the
14 interpretive exercise that the Tribunal must
15 undertake.

16 Firstly, I would like to make a couple of
17 preliminary points. In order to better appreciate
18 submissions that I will be making in respect of the
19 importance of the NAFTA objectives and the context
20 within which Article 1901(3) must be interpreted, I
21 would like to highlight at a high level the essence
22 of the debate that exists between the parties, and

1 when I'm doing that it's not getting into the
2 details of the specific words of Article 1901(3)
3 and the precise interpretation that each party is
4 advocating.

5 Now, the U.S. position is that all of
6 Canfor's claims are antidumping and countervailing
7 duty claims, and Chapter 19 is the only dispute
8 resolution mechanism that can deal with any conduct
9 which is in any way related to antidumping and CVD
10 matters or investigation, including the conduct
11 about which Canfor complains. Now, that's the U.S.
12 position. It has to be compared to the Canfor
13 position which is as follows.

14 Canfor's position that its claims are not
15 antidumping and countervailing duty claims, they
16 are claims that are premised on U.S. conduct which
17 violates international norms, Chapters 11 and 19
18 establish two distinct dispute resolution
19 mechanisms based on fundamentally different legal
20 regimes. One is based on municipal norms, and the
21 other is based on international norms. And the
22 conduct being complained about by Canfor can be

1 subjected to review under both dispute resolution
2 mechanisms, regardless of whether the conduct is in
3 any way related to antidumping and CVD matters or
4 investigations. So, that's the first preliminary
5 point.

6 The second preliminary point that I would
7 like to highlight was something that was dealt with
8 by the United States this morning, and that is
9 another important consideration to keep in mind
10 while you're hearing the oral submissions of Canfor
11 is that for the purposes of the motion, the
12 Tribunal must accept the facts as set out in
13 Canfor's statement of claim as true. Contrary to
14 the United States's position, it is Canfor's
15 position that it must assume that Canfor has been
16 subject to treatment that violates international
17 norms set out in Articles 102, 1102, 1103, 1105,
18 and 1110, simply for the purposes of this
19 jurisdictional motion. Once we get to merits, that
20 will have to be proved.

21 So therefore, at one level, the sole
22 question for this Tribunal is whether a claim in

1 respect of otherwise objectionable treatment is
2 precluded by virtue of Article 1901(3), and of
3 course Canfor's submission is that it is not.

4 Now, firstly, turning to the issue of the
5 NAFTA object and purpose, I want to do two things.
6 I would like to review both the key objectives in
7 the NAFTA, and I would also like to talk a little
8 bit about how other NAFTA tribunals have dealt with
9 the relevance and importance of the NAFTA
10 objectives in interpreting the NAFTA.

11 As I noted earlier, the U.S. focus in this
12 regard in their arguments is on one objective, the
13 objective to create effective procedures for the
14 resolution of disputes. I want to just make an
15 important point at the outset. Canfor does not
16 said resile from that objective. Canfor embraces
17 it, and we will argue that it is, indeed, one of
18 the key objectives that must be in the Tribunal's
19 mind when interpreting the relevant provisions of
20 NAFTA.

21 The U.S. is also critical of Canfor's
22 argument that a wide-ranging category of objectives

1 is relevant to the Tribunal's interpretive task in
2 this case, questioning, and I quote, how these
3 principles have any relevance to a proceeding under
4 the investment chapter, and the reference for that
5 is page 23 of the U.S. reply.

6 So, before I get to the specific
7 objectives, I would like to respond directly to
8 this point. The myopic approach suggested by the
9 United States is far too simplistic, and is not at
10 all in keeping with the interpretive exercise that
11 must be undertaken by the Tribunal. Although
12 Canfor's claim can be reasonably--can reasonably be
13 categorized as an investment dispute, the
14 interpretive exercise being undertaken by this
15 Tribunal is to interpret among other provisions the
16 provisions of Chapters 11 and 19, and the
17 interrelationship between them, and on a more
18 specific level Article 1901(3).

19 In that exercise, the Tribunal must take
20 into account all objectives which are relevant to
21 that interpretive exercise. The objectives of
22 NAFTA cannot be individually examined and then

1 assigned to a particular chapter of the treaty.
2 The treaty as a whole must be read having regard to
3 all of the objectives.

4 Now, if I could just take a moment to go
5 to the specific objectives that are articulated in
6 the NAFTA and for that purpose I will go to the
7 handout that we passed out earlier, and if we just
8 start with the preamble, which as you know Section
9 31 of the Vienna Convention says is, indeed,
10 relevant to the interpretive exercise, and this
11 informs the reader about the purpose of NAFTA, so
12 if I start with the preamble it says, and I'm
13 quoting, create an expanded and secure market for
14 the goods and services produced in their
15 territories, reduce distortions to trade, establish
16 a clear and mutually advantageous rules governing
17 their trade, ensure a predictable commercial
18 framework for business planning and investment,
19 build on the respective rights and obligations
20 under the general agreement on tariffs and trade
21 and other multilateral and bilateral instruments of
22 cooperation, and enhance the competitiveness of

1 their firms in global markets.

2 So, that's the setup for them which leads
3 then into the objectives which are articulated in
4 102, and they are as follows, and again I quote,
5 The objectives of this agreement as elaborated more
6 specifically through its principles and rules,
7 including national treatment, most-favored nation
8 is transparency are to, A, eliminate barriers to
9 trade in and facilitate in the cross-border
10 movement of goods and services between the
11 territories of the parties, promote conditions of
12 fair competition in the free trade area, increase
13 substantially investment opportunities in the
14 territories of the parties, provide adequate and
15 effective protection and enforcement of
16 intellectual property rights in each party's
17 territories, create effective procedures for the
18 implementation and application of this agreement
19 for its joint administration and for the resolution
20 of disputes, and establish a framework for further
21 trilateral regional and multilateral cooperation to
22 expand and enhance the benefits of this agreement.

1 Very broad, very powerful, but the
2 articulation of the objectives and the purpose of
3 NAFTA was not confined only to Article 102. Even
4 in connection with Chapter 19, the very chapter
5 relied on by the United States to limit the
6 protection provided by Chapter 11, the drafters of
7 the treaty thought it would be appropriate to
8 reiterate the underlying objectives of the NAFTA.
9 And if I could take you to that provision on page
10 two of the handout, and under Article 1902(2)(d),
11 it says, Each party reserves the right to change or
12 modify its antidumping law or countervailing duty
13 law, provided that in the case of an amendment to
14 the parties antidumping or countervailing duty
15 statute, such amendment as applicable to the other
16 party is not inconsistent with the object and
17 purpose of this agreement and this chapter, which
18 is to establish fair and predictable conditions for
19 the progressive liberalization of trade between the
20 parties to this agreement while maintaining
21 effective and fair disciplines and unfair trade
22 practices, such object and purpose to be

1 ascertained from the provisions of this agreement,
2 its preamble and objectives, and the practices of
3 the parties.

4 So, these are the clearly articulated
5 objectives which form the backdrop against which
6 the Tribunal must undertake its analysis and must
7 be kept foremost in your mind as you're looking at
8 the various interpretations that are being
9 advocated by the parties.

10 Now, the second part of this is how have
11 tribunals approached the NAFTA objectives? How
12 have they looked at the importance of the NAFTA
13 objectives in the interpretive exercise? And,
14 Mr. President this is where I would like to refer
15 to one of the authorities, and it's at volume one
16 of Tab 10 of our--the authorities that were filed
17 with our preliminary reply.

18 PRESIDENT GAILLARD: Yes, we have it.

19 MR. LANDRY: Now, that was a case
20 regarding tariffs applied by Canada to certain U.S.
21 origin agricultural products. It's a report of a
22 panel in December of 1996, and the case involved a

1 dispute between Canada and the United States
2 relating to the U.S. complaint that Canada was
3 applying duties to certain agricultural products
4 higher than specified in the NAFTA, and this panel
5 was established under Article 2008 of NAFTA, and
6 that the U.S. was invoking Articles 3011 and 2 and
7 it was alleging that under the NAFTA Canada could
8 not increase custom duties beyond what was in
9 existence as of the date of the NAFTA.

10 So, again, it's a fairly complicated
11 judgment that dealt with a number of different
12 things, but, of course, the interpretive exercise
13 was of utmost importance to that panel. And if I
14 could take the Tribunal to pages 33 and 34 of that
15 report where they dealt with the issue of
16 interpreting statutes, and you can see starting at
17 paragraph 118 on page 33--do you have that,
18 Mr. President?

19 PRESIDENT GAILLARD: Yes, we do.

20 MR. LANDRY: You can see where they find
21 the starting point, Article 102(2) which we have
22 gone through, and then it starts at 119. It says,

1 "The applicable rules of international law include
2 the parties agree Articles 31 and 32 of the Vienna
3 Convention which are generally accepted as
4 reflecting customary international law." And they
5 go on to quote from that, and after the quote they
6 say, "The panel must therefore commence with the
7 identification of the plain and ordinary meaning of
8 the words used. In doing so, the panel will take
9 into consideration meaning actually to be
10 attributed to the words and phrasing, looking at
11 the text as a whole, examining the context--the
12 context in which the words appear and considering
13 them in the light of the object and purpose of the
14 treaty."

15 Then it goes on to talk further about
16 subsequent agreement, subsequent practice. I would
17 like to take you to paragraph 122 which says this.
18 "The panel also attaches importance to the trade
19 liberalization background against which the
20 agreements under consideration here must be
21 interpreted. Moreover, as a free trade agreement,
22 the NAFTA has the specific objective of eliminating

1 barriers to trade amongst the three contracting
2 parties. Principles and rules so rich the
3 objectives of the NAFTA are elaborated are
4 identified in NAFTA Article 102(1) as including
5 national treatment, most-favored-nation treatment,
6 and transparency.

7 "Any interpretation adopted by this panel
8 must therefore promote rather than inhibit the
9 NAFTA's objectives. Exclusions to obligations of
10 trade liberalization must perforce be viewed with
11 caution."

12 And that type of an approach,
13 Mr. President, panel members, is the approach that
14 NAFTA tribunals have traditionally taken to this
15 exercise that we are talking about.

16 So, given these explicitly articulated
17 objectives and the importance of the objectives to
18 the interpretive exercise, where does that lead us?
19 And again, I'm just focusing on the effect that the
20 U.S. interpretation has in relation to those
21 explicit objectives. That's the focus of my
22 comments, and I would like to actually refer to

1 my--our original memorial, which is called the
2 reply memorial, Canfor.

3 PRESIDENT GAILLARD: Are we done with this
4 document, or do you want to get back to it?

5 MR. LANDRY: We are done with that
6 document, I believe. Thank you.

7 And I would like to go to page 18, which
8 summarizes succinctly what our position is in this
9 regard. And realize once again that the focus on
10 the effect that the U.S. interpretation has in
11 relation to the explicit objectives that we just
12 talked about, and it's on page 18 under the heading
13 United States Interpretation is Not in Keeping with
14 the Object and Purpose of NAFTA.

15 PRESIDENT GAILLARD: I'm sorry, page 18 of
16 what?

17 MR. LANDRY: Of the reply memorial which
18 is the first memorial that we filed.

19 PRESIDENT GAILLARD: Yes, thank you.

20 MR. LANDRY: Now, on page 18 under that
21 heading, under paragraph 54 I would like to pick
22 up, and again we are focusing on the effect of the

1 U.S. interpretation, in the second line of
2 paragraph 54 where it starts, "It is noteworthy."

3 Do you have that, Mr. President?

4 PRESIDENT GAILLARD: Yes, we do.

5 MR. LANDRY: I'm quoting, it is noteworthy
6 that the interpretation advanced by the United
7 States ignores the progressive widening of state
8 responsibility that the NAFTA parties have
9 expressly agreed to throughout NAFTA, including in
10 relation to the protections given to investors
11 under Chapter 11. Notwithstanding this progressive
12 widening of state responsibility, the United States
13 now advocates an interpretation of Article 1901(3)
14 which would allow its officials to treat Canfor in
15 a way which violates the standard of treatment it
16 agreed to--sorry, it agreed it would accord foreign
17 investors, including Canfor under Chapter 11, so
18 long as its conduct relates in some way to the
19 exercise of any discretion, right, or power it may
20 have in relation to antidumping and countervailing
21 duty matters, simply because the NAFTA parties
22 reserved their right under NAFTA to maintain their

1 antidumping and countervailing duty law. Surely,
2 the NAFTA parties could not have intended that the
3 right to maintain antidumping and countervailing
4 duty laws could be used so as to provide a cover
5 for arbitrary discretionary conduct by officials
6 under color of law. If the respondent was correct
7 about Article 1901(3), the specific objectives set
8 out in Article 1902(2)(d)(2) and the objectives of
9 the NAFTA as a whole, and Chapter 11 in particular,
10 could be easily frustrated by a party labeling the
11 most patently offensive government conduct as being
12 undertaken with respect to its antidumping or
13 countervailing duty law, particularly if that law
14 existed as of the date the NAFTA came into force.
15 Serious harm could be visited upon an investor
16 whose trading activity was targeted by the measure
17 with no right of compensation, despite the open
18 promise of protection plainly afforded to qualified
19 investors under Chapter 11.

20 PRESIDENT GAILLARD: This is the labeling
21 argument which I alluded to this morning?

22 MR. LANDRY: Yes.

1 Now, it's important to understand and
2 important to emphasize and understand that Canfor
3 is not advocating an interpretation of NAFTA which
4 requires the Tribunal to override the specific
5 wording of NAFTA or any specific objective of
6 NAFTA, such as the objective to create effective
7 procedures for the resolution of disputes. Canfor
8 is simply advocating an interpretation of NAFTA
9 which is in accord with the ordinary meaning of the
10 words and used in Article 1901(3) which promotes
11 rather than inhibits the objectives of NAFTA.

12 Now, before turning to a more detailed
13 discussion and context, I would like to
14 specifically respond to this U.S. argument
15 regarding the one objective it considers of utmost
16 importance, and for that purpose I would like to
17 refer to our rejoinder memorial at page 24,
18 starting at paragraph 53, Mr. President.

19 PRESIDENT GAILLARD: Yes.

20 MR. LANDRY: And I quote, finally, the
21 United States submission that denying Canfor access
22 to the dispute resolution mechanism of Chapter 11

1 is necessary to facilitate the creation of
2 effective procedures for the resolution of disputes
3 cannot be sustained. Clearly, in the context of
4 the softwood lumber dispute it cannot be contended
5 that the Chapter 19 process has been an effective
6 process for dispute resolution. Effective dispute
7 resolution is effective for both investors and
8 state parties. However, despite binational and
9 international tribunals continually ruling the
10 United States's conduct has been inconsistent both
11 with its municipal and its international
12 obligations, the United States has consistently
13 either intentionally delayed implementation of
14 necessary corrective action, and I pause there to
15 note that the example used in the footnotes is the
16 Byrd Amendment--flaunted, ignored, or chastised the
17 constituted panel rulings, and I use those words
18 carefully, and I would only ask the Tribunal to
19 refer to the most recent decision of the Chapter 19
20 Panel in relation to the ITC matter--or take
21 untenable positions on important issues. And I
22 pause there to say that an example of that which is

1 referred to here is in the antidumping Chapter 19
2 proceedings where there is no doubt in the
3 discussion that is presently ongoing between the
4 Chapter 19 Panel and the DOC, that they have ruled
5 in respect of a certain company at a British
6 Columbia called West Fraser that they made an error
7 of law which meant that duties were collected under
8 an error of law, and yet the position of the United
9 States in that proceeding is that those duties
10 should not be paid back to West Fraser.

11 All of which clearly demonstrate the
12 United States has little intention of complying
13 with its international obligations in good faith.
14 More specifically--

15 PRESIDENT GAILLARD: Mr. Landry, can I
16 interrupt at this stage because I had a question
17 there, and maybe I can ask this question now as
18 opposed to tomorrow, unless you--

19 MR. LANDRY: By all means.

20 PRESIDENT GAILLARD: You can answer now or
21 tomorrow, whichever you refer, but I would like to
22 know when referring to your paragraph 54 which you

1 just discussed again, the actions or lack thereof
2 which you complain about, can you tell us what is
3 your position about which provisions of Chapter 11
4 Section A would violate, the fact not to implement
5 decisions which have been taken rendered pursuant
6 to Chapter 19? In your opinion, it violates which
7 provisions of Chapter 11 Section A? You may answer
8 tomorrow, but you don't have to right now.

9 MR. LANDRY: My first response to that,
10 Mr. President, would be obviously 1105, fair and
11 equitable treatment.

12 PRESIDENT GAILLARD: I thought you would
13 say that, but okay, you may elaborate on that
14 tomorrow.

15 MR. LANDRY: Thank you.

16 Just going beyond paragraph 54 to 55,
17 keeping in mind what we are looking at here is the
18 effective dispute resolution process alleged by the
19 United States, and I quote, More specifically, the
20 dispute resolution process under Chapter 19 in
21 connection with the latest iteration of the dispute
22 has been underway for an excess of two years, I

1 believe it's three years, during which time
2 over--and I had over \$2 billion there, I might just
3 a little bit of an update to that. It's actually
4 approximately \$3.8 billion of duties have been
5 levied against the Canadian industry. And several
6 hundred million--

7 PRESIDENT GAILLARD: As of when? If you
8 make the update. 3.8 is as of now?

9 MR. LANDRY: I believe that we checked as
10 of today. I believe, Mr. President, and I will
11 confirm that, but I believe it's as of today. And
12 again, it's an approximation.

13 PRESIDENT GAILLARD: Thank you.

14 MR. LANDRY: And we have here several
15 hundred million dollars against Canfor. In fact,
16 that's in excess of \$500 million against Canfor.

17 I continue. In that regard, the recent
18 pattern of conduct of the United States authorities
19 in relation to Chapter 19 is consistent with the
20 approach taken by the United States throughout this
21 dispute. In fact, the attitude of the United
22 States that supposedly effective dispute resolution

1 process embodied under Chapter 19 has been nothing
2 short of a wanton denial of the Chapter 19's
3 Tribunal's authority such, and I quote, obviate the
4 impartiality of the agency decision-making process
5 and severely undermine the entire Chapter 19 review
6 process. In fact, one panelist in the Chapter 19
7 Panel used the word mockery.

8 This is serious stuff. Nothing short of
9 permitting Canfor to advance its claims respecting
10 the egregious government misconduct of the United
11 States can allow it to vindicate its rights or
12 achieve the objective of effective dispute
13 resolution.

14 I want to just stop here to say this to
15 the Tribunal. This claim, this Chapter 11 claim,
16 is of immense importance to Canfor. This is not an
17 issue of questioning Chapter 19 Panel proceedings.
18 This is an issue that the only relief, the only
19 remedy that it can get relative to the damage it
20 has suffered as a result of this egregious conduct
21 is through a Chapter 19 proceeding. It's a remedy
22 of necessity. Chapter 11. Sorry. It's a remedy

1 of necessity.

2 So, contrary to the U.S. argument,
3 Canfor's interpretation does create effective
4 procedure for resolution of disputes, more
5 particularly unlike the U.S. position. It allows
6 for all disputes, whether they're based on
7 international norms or municipal norms, to be
8 resolved between the parties.

9 I would like to just switch topics a
10 little bit and go over to the issue of context
11 which again, as I indicated earlier, is another key
12 element of the interpretive exercise that Article
13 31 of the Vienna Convention mandates. We set out
14 in pages, and I will just make this reference for
15 the record, we set out in pages 21 to 26 of our
16 original memorial a general description of the
17 provisions of Chapters 11 and 19, and I will not go
18 through them in detail here, but just mention that
19 for the record.

20 Now, the U.S. interpretation of Article
21 1901(3) is premised, in our submission, on a
22 fundamental misconception of the architecture of

1 NAFTA and rules of Chapters 11 and 19. Properly
2 understood, these two chapters deal with
3 fundamentally different legal regimes which are
4 maintained for different purposes. In essence,
5 Chapter 11 is an investor state arbitration regime
6 utilizing international norms, international law
7 standards of review to scrutinize treatment of
8 foreign investors and their investments by the
9 NAFTA parties. Whereas in essence Chapter 19 is a
10 municipal law regime which allows for judicial
11 review by binational panels of final antidumping
12 and countervailing duty determinations, and they
13 utilize municipal norms and standards all focused
14 on scrutinizing unfair trade practices in relation
15 to goods being imported into the NAFTA countries.

16 If we take a little bit of time with 11
17 versus 19, if we look at Chapter 11, Chapter 11 is
18 rooted in customary international law in relation
19 to state responsibility. It provides protection
20 for, amongst other things, arbitrary, unjust, and
21 inequitable or expropriatory treatment against
22 foreign investors. The remedies under Chapter 11

1 are limited to damages, and it's important to
2 emphasize that fact because the remedies under
3 Chapter 11 do not allow investors to seek relief
4 that mandates a change or modification in any way
5 of the municipal antidumping or CVD law, or any
6 municipal law.

7 If we switch to Chapter 19, Chapter 19 is
8 a political bargain which substitutes binational
9 judicial review for municipal judicial review of
10 final antidumping and CVD determinations again as I
11 indicated, based on municipal law and utilizing
12 municipal law standards of review. It preserves
13 each party's right to continue to maintain and
14 apply their domestic antidumping and CVD law which
15 laws are aimed at remedying unfair trade practices.

16 It also, Chapter 19, imposes on the
17 parties obligations, Chapter 19 does, imposes
18 obligations on the parties with respect to their
19 domestic antidumping and CVD law. More
20 particularly in NAFTA, it imposes an obligation to
21 change their laws, their antidumping and CVD laws
22 in a certain manner, which is more particularly,

1 for the record, laid out, for example, in Article
2 1904(15). There is a long list of things where the
3 parties have agreed in NAFTA that they will change
4 or modify their law. So, it's imposing an
5 obligation on the party in NAFTA to change their
6 law. It doesn't change their law. It simply
7 imposes an obligation on them to change their law.
8 And, of course, as we now know, United States,
9 Canada and Mexico did, as a result of undertaking
10 that obligation, have now changed their law.

11 Secondly, Chapter 19 imposes an obligation
12 on the parties that when they amend their domestic
13 antidumping or countervailing duty law, it must be
14 consistent with the WTO agreements and the object
15 and purpose of the NAFTA. Article 1902 provision
16 that we discussed earlier.

17 So, again, once again, there is an
18 imposition of an obligation on the United States
19 with respect to its law as to what it is to do or
20 not to do in that respect.

21 So, contrary, in our submission, contrary
22 to the U.S. argument, Chapters 11 and 19 are

1 complementary and completely reconcilable with each
2 serving its own distinct purpose. They applied
3 different laws, they're focused on very different
4 issues, treatment of foreign investors versus
5 unfair trade practices, and provide different
6 remedies. Any contact being scrutinized within the
7 two different dispute resolution mechanisms
8 established under the two chapters will be
9 used--will be reviewed using different norms
10 against different standards of review, and will
11 give rise to different types of relief.

12 Now, in this type of context in terms of
13 our discussion about Chapter 11 and Chapter 19 is
14 extremely important to understand what Canfor's
15 claim is and what it is not. Canfor's claim is not
16 an appeal or a judicial review of a final
17 antidumping or CVD determination of the DOC or ITC
18 under U.S. law. More specifically, the primary
19 focus of Canfor's claim is not whether the
20 preliminary and final antidumping and CVD
21 determinations of the DOC and ITC were made
22 consistent with U.S. municipal law. Canfor's claim

1 is independent and arises in a different legal
2 regime than those challenges.

3 Further, Canfor's claim is not premised on
4 a finding of this Tribunal, that the United States
5 has violated its own municipal laws. Those issues
6 are being dealt with under the municipal law regime
7 established under Chapter 19. The principal focus
8 of Canfor's claim is the arbitrary, discriminatory,
9 and abusive treatment the incidence of which
10 treatment taken individually and collectively
11 failed to meet the standards of treatment the U.S.
12 obliged itself to accord to foreign investors.

13 A summary, Mr. President and panel
14 members, of effectively the claims that are being
15 made by Canfor, the best summary that I could find
16 in the Statement of Claim for the purposes of our
17 discussion is starting at paragraph 20 of the
18 statement of claim, if--Mr. President, do you have
19 the statement of claim?

20 PRESIDENT GAILLARD: Yes, we do.

21 MR. LANDRY: That's at page 5, and I will
22 read from paragraph 20. It says, "The present

1 claim arises from the unfair and inequitable and
2 discriminatory treatment of the Canadian softwood
3 lumber industry, including Canfor, or more
4 particularly Canfor and its subsidiaries by the
5 Government of the United States. A review of the
6 treatment received by the Canadian softwood lumber
7 industry over the past 20 years demonstrates a
8 pattern of conduct designed to ensure a
9 predetermined, politically motivated, and
10 results-driven outcome to the investigations
11 resulting in the various determinations listed
12 there."

13 And then if you would go to paragraph 109
14 which is at page 30. And I might note,
15 Mr. Chairman, we apologize for this, but there is a
16 numbering problem in the statement of claim. You
17 will see just if you look at page 30 and page 32,
18 you end up having two paragraph 109s. Seems to be
19 the numbering got a problem with the claim.

20 In any event, the 109--

21 PRESIDENT GAILLARD: The one you want is
22 the first one?

1 MR. LANDRY: The ne I want is the first
2 one, thank you.

3 And it says there, and again this is
4 effectively an overview of the violations of NAFTA
5 that are being claimed by Canfor, and it says, and
6 I quote, The actions of the respondent,
7 particularly as evidenced by the conduct of the DOC
8 and ITC as described herein and as will be more
9 fully elaborated at the hearing in this proceeding,
10 whether considered individually or collectively or
11 as part of a campaign against the Canadian softwood
12 lumber industry, all are such as to fall below the
13 standard required of a state under NAFTA's 1102,
14 1103, and 1105. That's the standards against which
15 the conduct that we are going to be complaining
16 about have to be tested.

17 PRESIDENT GAILLARD: In other words,
18 Mr. Landry, when you say in your briefs that the
19 conduct of respondent has violated U.S. laws with
20 respect to antidumping and countervailing duties,
21 you say that in passing, but it's not the basis of
22 your claim because you were--this morning

1 respondent quoted certain passages of your briefs
2 in which you do say that U.S. law has been
3 violated.

4 So, your answer to that is, we say that
5 for the context, but that's not the legal basis for
6 our claim; is that correct?

7 MR. LANDRY: That's absolutely correct,
8 Mr. Chairman. In fact, just because there is an
9 unlawful exercise of a discretionary right under
10 municipal law, it goes without saying that that
11 does not necessarily meet the standard that we have
12 to meet, or vice versa.

13 In fact, in following up on that,
14 Mr. Chairman, it's irrelevant that the same factual
15 matrix may give rise to a Chapter 19 remedy and a
16 Chapter 11 remedy. Simply stated, the conduct in
17 question is being tested under different norms and
18 different standards of review.

19 Therefore, although the dispute resolution
20 mechanism procedures under Chapters 11 and 19 are
21 similar in that their goal is to safeguard the
22 interests of individuals economic actors, their

1 difference lies in the manner in which they achieve
2 that goal. Well, Chapter 11 establishes a legal
3 regime under recognized and developing standards of
4 international law that provides a mechanism to
5 obtain compensation to foreign investors for harm
6 caused by a breach of those international law
7 standards. Chapter 19 provides simply a
8 complementary remedy by which one can seek from a
9 binational panel review from final determinations
10 made under a party's antidumping and countervailing
11 duty law aimed at protecting the domestic industry
12 in accordance with municipal law standards of
13 judicial review of administrative action.

14 Now, that provides a context, and what I
15 would like to do is to turn to how the U.S. has
16 dealt with the context issue in their original
17 objection and respond to a number of points that
18 were made by the U.S., and the U.S. reply--sorry,
19 the U.S. objection at pages 23 and 25 is where they
20 deal with the issue of context.

21 Now, they start by--with the conclusion,
22 and I quote, they say that an examination of the

1 context of Article 1901(3) confirms that Chapter 19
2 provides an exclusive forum under the NAFTA for a
3 dispute arising under party's antidumping and
4 countervailing duty law. And then what they do is
5 they selectively analyze several provisions of
6 NAFTA which they say conclusively support their
7 proposition, and they referred to Articles 2004,
8 1112, and 1115.

9 Taking each one of them in relation to
10 Article 2004, the U.S. argues that since the
11 provisions specifically excludes matters covered
12 under 19--you will recall that discussion this
13 morning--it would make no sense not to allow the
14 states to pursue state-to-state dispute resolution
15 relating to antidumping and CVD laws, but to allow,
16 and I quote, private claimants the privilege of
17 doing so under Chapter 11.

18 In relation to Article 1112, which
19 mandates resolution of any inconsistency between
20 Chapter 11 and other chapters, in favor of the
21 other chapter, the U.S. states, and I quote, It
22 would be particularly odd for investor-state

1 arbitrations under Chapter 11 to afford greater
2 private rights to private claimants than the NAFTA
3 parties given the subordinate position of the
4 investment chapter in the treaty, closed quotes.

5 In relation to 1115, the U.S. says that
6 the parties obviously acknowledge the certain
7 overlap between investor-state arbitrations under
8 Chapter 11 and state-to-state dispute resolution in
9 relation to the same matter, and therefore this
10 confirms state-to-state rights in Article 1115,
11 notwithstanding the private parties' right to bring
12 forward an investor-state proceeding. U.S. argues
13 that if the parties intended that the same measure
14 could be subjected to dispute resolution under 11
15 and 19, surely that there would be some mention of
16 that, so they implicitly argue that this,
17 therefore, signifies that they didn't--that the
18 parties did not want to subject the same measure to
19 dispute resolution under Chapters 19 and 11. Those
20 are the three basic propositions under this
21 heading.

22 None of these arguments, in our

1 submission, withstand scrutiny.

2 In general, the fundamental misconception
3 which arises out of the U.S. argument is that they
4 assume that what Canfor is attempting to do, to
5 claim under Chapter 11 is for matters that are
6 covered under Chapter 19. That is not so. As I've
7 stated on a number of occasions this afternoon,
8 Canfor's Chapter 11 claim does not subject conduct
9 to scrutiny under municipal law. It subjects the
10 U.S. conduct to scrutiny under international law,
11 and an international standard of review.

12 Canfor's involvement in the Chapter 19
13 proceedings relates to a completely different legal
14 regime and standards review. In that proceeding,
15 it's subjecting the conduct of the U.S. to scrutiny
16 under municipal law. There is no question about
17 that. But Canfor is not invoking Chapter 11
18 dispute resolution to question the antidumping and
19 CVD laws of the application of those laws pursuant
20 to municipal norms and municipal standards of
21 review. It is simply not claiming under Chapter 11
22 for matters covered under Chapter 19. So, that

1 takes us to Article 2004.

2 Canfor's argument does not provide foreign
3 investors with more rights than NAFTA parties. It
4 is simple as that, given that argument. The same
5 type of proceedings that is--that would be taken by
6 Canfor under Chapter 11, the same complaints, we
7 say, can be raised by the states in Chapter 20.
8 Because we are not, Canfor is not raising matters
9 that are covered by Chapter 19, just like the
10 states, the NAFTA parties would not be raising
11 matters that were otherwise covered under Chapter
12 19.

13 So, the U.S. point in relation to
14 Article 2004, given Canfor's position is without
15 merit.

16 They then, going to Article 1112, the
17 inconsistency provision, again under that, I repeat
18 there is no attempt to afford greater rights to
19 private claimants than the NAFTA parties have in
20 this regard.

21 There is no inconsistency between Chapter
22 11 and Chapter 19 or Chapter 20. The U.S. raises

1 in its argument the concern that the fact that
2 Canfor can pursue under Chapters 11 and 19 would
3 give rise to critical inconsistencies, but yet they
4 don't identify any critical inconsistencies that
5 would arise. Again, fundamentally different claims
6 based on fundamentally different legal regimes.
7 They're complementary. They don't overlap.

8 In relation to Article 1115, which is the
9 one that effectively reserves the rights, and you
10 can see that in the handout that we passed out. It
11 says on page two, 1115 says without prejudice to
12 the rights and obligations of the parties under
13 Chapter 20, and it talks about Chapter 11
14 proceedings for private parties. Well, the reason
15 that is mentioned there is because we are talking
16 about the exact same type of claim that would be
17 raised by a state in relation to Chapter 11 that a
18 foreign investor would raise in respect of Chapter
19 11. That's why it's mentioned there. There is no
20 need to mention Chapter 19 in the context of that
21 type of provision because Chapter 19 is a
22 completely different legal regime.

1 Neither of the claims that, as I mentioned
2 earlier, under Article 2004, if brought by--that
3 claim that would be brought by a NAFTA party would
4 be the same type of claim that the private investor
5 would be taking.

6 PRESIDENT GAILLARD: Mr. Landry, the
7 Tribunal will have questions on this, so I'm saying
8 that to both parties. This is an area which we
9 want to explore further tomorrow afternoon.

10 MR. LANDRY: Thank you.

11 PRESIDENT GAILLARD: I don't want to
12 engage into a Q and A session now because I don't
13 want to disrupt your presentation, but that's just
14 to flag the fact that we would like further
15 elaboration on this tomorrow.

16 MR. LANDRY: You're speaking
17 specifically--

18 PRESIDENT GAILLARD: The issue of the
19 state-to-state versus the--the scope of the
20 state-to-state versus investor-state arbitrations
21 pursuant to NAFTA when it has to do, and here I'm
22 vague on purpose because I don't want to put words

1 in the mouth of either party, when it has something
2 to do with antidumping and countervailing duties.
3 Do you understand the question, the topic?

4 MR. LANDRY: I do.

5 PRESIDENT GAILLARD: Thank you.

6 MR. LANDRY: I would also like to take a
7 look quickly at Article 1121, Mr. President, panel
8 members, which in our submission points out that
9 Chapter 11 itself recognizes the ability to pursue
10 proceedings in relation to the same measure which
11 allows for investor-state arbitration in relation
12 to damages to go ahead at the same time as
13 proceedings for extraordinary relief not involving
14 payment of damages.

15 This morning, the United States quoted
16 from Article 1121, but they left out a portion of
17 1121, and the portion that they left out is at the
18 bottom of the clause that I've recounted here,
19 which effectively says they have to waive--the
20 investor has to waive the right to initiate or
21 continue before the court any proceedings with
22 respect to a measure that is alleged to be breached

1 of Article 1116, except for proceedings for
2 injunctive, declaratory, or other extraordinarily
3 relief not involving the payments of damages.

4 So, the NAFTA, under 1121, actually
5 contemplates the possibility that one would bring a
6 claim for damages under the investor-state
7 provision and at the same time be able to seek
8 relief in a domestic court in relation to
9 proceedings--for extraordinary relief not involving
10 the payment of damages.

11 PRESIDENT GAILLARD: Just to be clear,
12 your contention is that whatever actions Canfor is
13 taking pursuant to Chapter 19, falls under the
14 characterization of injunctive relief pursuant to
15 the meaning of these provisions; is that correct?

16 MR. LANDRY: Extraordinary relief. It's
17 injunctive. It says injunctive, declaratory, or
18 other extraordinary relief.

19 PRESIDENT GAILLARD: So, you're saying
20 it's not injunctive, but it doesn't fall under the
21 injunctive relief category, but under the--

22 MR. LANDRY: Extraordinary relief

1 category.

2 And also, as my friend pointed out, it
3 does not involve the payment of damages, of course.
4 It is simply for judicial review of an action of
5 various stripes, in this case the DOC and the ITC.

6 PRESIDENT GAILLARD: We understand the
7 argument on this. We just wanted to know under
8 which category you would justify the sort of what
9 they called the duplication and the other side of
10 the bar.

11 MR. LANDRY: Extraordinary relief not
12 involving the payment of damages.

13 PRESIDENT GAILLARD: Thank you.

14 MR. LANDRY: I might add, Mr. President,
15 that of course extraordinary relief could involve
16 declaratory relief, but I'm wasn't focusing for
17 sure on injunctive relief.

18 PRESIDENT GAILLARD: All right. Thank
19 you.

20 MR. LANDRY: So just to sum up this part
21 of my argument, so, accordingly, in response to the
22 what we called the simplistic approach or analysis

1 undertaken by the United States to justify its
2 interpretation based on context, we say it's
3 patently insufficient for the purposes of
4 interpreting 1103. It does not take undertake the
5 rigorous analysis that we say is necessary in order
6 to determine the context, and furthermore, in any
7 event, the provision on which it relies,
8 Article 2004, Article 1112, and Article 1115, just
9 do not support their interpretation. Sorry, do not
10 support the interpretation being advocated by the
11 United States.

12 Now, I would like to switch topics a
13 little and go to a point that I raised at the very
14 beginning, which relates this whole concept of
15 parallel proceedings and the allegations of
16 redundancy and conflicting judgments. On the
17 written arguments there is a substantial amount of
18 discussion concerning parallel proceedings and what
19 NAFTA said or presumed about so-called parallel
20 proceedings.

21 In reviewing those arguments in preparing
22 for today, it was clear to me there was no real

1 specific definition of a parallel proceeding which
2 was used to inform the debate which may have had
3 the effect of confusing what conclusions could be
4 drawn from the analysis undertaken by both the
5 parties. And I would just like to talk through
6 that a little bit, and I would like to start with
7 where the debate, I believe, started, which is at
8 page 27 of the U.S. objection, I believe. Just one
9 second, Mr. President.

10 PRESIDENT GAILLARD: I think you're
11 correct.

12 MR. LANDRY: Page 27 of the U.S.
13 objection.

14 So, the debate started with the U.S.
15 allegation that the NAFTA's object and purpose
16 confirmed that the U.S. did not consent to
17 arbitrate Canfor's claims under the investment
18 chapter. More particularly, actually, it started
19 in relation to the U.S. analysis concerning the one
20 specific objective of the NAFTA that it did
21 discuss, that being the objective to create
22 effective procedures for the resolution of

1 disputes.

2 Now, the U.S. position was that the NAFTA
3 rules for dispute resolution revealed an overriding
4 concern to promote effective dispute resolution
5 procedures and to avoid deficiencies resulting
6 from, and I quote, redundant proceedings between
7 the same parties before different dispute
8 resolution panels. They argued that their
9 interpretation of Article 1901(3) making Chapter 19
10 the exclusive forum under NAFTA for the resolution
11 of antidumping and CVD matters was fully consistent
12 with that object and purpose of the treaty.

13 It then went on to talk about the
14 proliferation of international tribunals outlining
15 one consequence of that being expanded
16 opportunities to subject the same disputes
17 simultaneously or consecutively to multiple fora
18 giving rise to redundant proceedings. And then it
19 used a specific example of redundant proceedings
20 from the NAFTA arising under Annex 1120.1, and if
21 you would refer to the footnote 66 on page 29 of
22 their argument, you will see--sorry, 106. 106 on

1 page 29 of the argument. You will see the Annex
2 1120.1, and again it's quoted there. It says,
3 "With respect to the submission of a claim to
4 arbitration, sub A, an investor of another party
5 may not allege that Mexico has breached an
6 obligation under Section A both in an arbitration
7 under this section and in proceedings before a
8 Mexican court or administrative tribunal."

9 Then it says that this provision, and
10 again I quote, was evidence of the parties' intent
11 to avoid providing the claimants with the ability
12 to submit under Chapter 11 the same claims that
13 were submitted elsewhere.

14 Now, the U.S.'s veiled concern that
15 allowing Canfor claims to proceed while at the same
16 time Chapter 19 panels are proceeding would result
17 in redundant proceedings is just, in our
18 submission, totally without merit.

19 Let me be very clear. What Canfor's
20 position is is allowing Chapter 11 and Chapter 19
21 proceedings to proceed at the same time will not
22 result in redundant proceedings. Redundant

1 proceedings are proceedings where the exact same
2 dispute, parties, the objects and cause of action
3 is the subject matter of the dispute resolution in
4 two different processes. Like, for example, the
5 type that the U.S. actually cited from Annex
6 1120.1.

7 The argument that Chapter 11 or Canfor's
8 claims and Chapter 19 claims will result in
9 redundant proceedings is just fundamentally not the
10 case. Even assuming the conduct at issue is the
11 same, the Chapter 11 proceeding will scrutinize the
12 conduct, as I've said many times, under
13 international law, according to international law
14 norms and standard of review. The Chapter 19 will
15 test that same conduct under municipal law norms
16 and municipal law standards of review.

17 The decisions arising from the two legal
18 processes will not be conflicting because they will
19 be dealing with different causes of action,
20 different claims and different remedies. It's no
21 different than allowing a Chapter 11 proceeding to
22 go forward and a Chapter--sorry, allowing a Chapter

1 11 and Chapter 19 proceeding--processes to proceed
2 at the same time is no different than or no more
3 redundant than the same conduct being scrutinized
4 under Chapter 19, according to municipal law, and
5 under the WTO dispute resolution mechanism. Where,
6 of course, conduct is being--that same conduct
7 could be scrutinized in relation to its consistency
8 under the WTO agreement. Different causes of
9 action, different types of claims, different types
10 of remedies.

11 And it's also no different than many
12 recent investor-state arbitration cases where
13 investor-state--tribunals explicitly recognized the
14 inherent and fundamental difference between claims
15 based on domestic law and domestic courts and
16 treaty claims in relation to the exact same
17 conduct. Such claims are obviously not found to be
18 redundant and were allowed to proceed. And of
19 course, I would reference here, there are a number
20 of cases, but the one case in particular I would
21 reference is the SGS versus Pakistan case, which I
22 would like to refer to which is at volume two of

1 the authorities, Mr. President.

2 PRESIDENT GAILLARD: We'll have it in
3 front of us in a second.

4 MR. LANDRY: And it's at Tab 16.

5 Do you have that, Mr. President?

6 PRESIDENT GAILLARD: Yes, you may proceed.

7 MR. LANDRY: Thank you. Now, again, this
8 case involved the jurisdictional motion by the
9 state of Pakistan, and I know, Mr. President, you
10 are familiar with the case, but Pakistan objected
11 to the jurisdiction of the Tribunal on a number of
12 various grounds. The claim, the case involved the
13 alleged breach of a pre-shipment inspection
14 agreement between SGS and Pakistan, whereby SGS
15 provided customs services to Pakistan, and the
16 principal focus of the motion is that the BIT claim
17 arose under contract, and the parties had
18 previously agreed that any breach of contract would
19 be referred to arbitration under domestic law in
20 Pakistan. And Pakistan alleged that the arbitral
21 process under the contract predated the request for
22 the investor-state arbitration under the BIT by 11

1 months, and Pakistan asked the Tribunal to
2 recognize the primacy of the parties freely
3 negotiating dispute resolution mechanism over the
4 jurisdiction of the Tribunal. And as I said, there
5 were numerous issues raised by both parties, but
6 the discussion relating to whether or not the
7 Tribunal had jurisdiction to determine the BIT
8 claims in light of the fact that arbitration--of
9 the arbitration under the contract had been
10 initiated is of most relevance to this proceeding.

11 And I think the importance of the case is
12 the way in which the Tribunal differentiated
13 between BIT claims from contract claims and whether
14 and how claims under domestic law were different
15 than BIT claims. And there have been a number of
16 cases even since the SGS-Pakistan case, and I
17 reference a couple of them, the CMS case, the
18 Occidental case, and a number of others in the
19 authorities. And a number that arose out of the
20 economic crisis that arose in Argentina.

21 I would like to reference a number of
22 paragraphs in this case. I would like to start at

1 paragraph 321 which is at page--sorry, paragraph 40
2 at 321. I apologize.

3 PRESIDENT GAILLARD: When you refer to the
4 cases which arise from the Argentine crisis, which
5 cases are you referring to?

6 MR. LANDRY: There are a number of recent
7 cases, Mr. President.

8 PRESIDENT GAILLARD: You may tell us
9 tomorrow which ones you have in mind. I have in
10 mind the CMS case and Occidental, but if you have
11 specific references to other cases, I would be
12 interested.

13 MR. LANDRY: We will. The one that comes
14 to mind that I do recall--

15 PRESIDENT GAILLARD: I mean, of course, on
16 this particular point of duplication.

17 MR. LANDRY: The one that comes to mind,
18 Mr. President, is the Enron case, but we will
19 provide you with references tomorrow.

20 Starting with paragraph 43, just to get a
21 context within which the debate happens later on in
22 the discussion, this is effectively giving what

1 Pakistan was asserting, and it says that paragraph
2 43, and I quote, Pakistan asserts that this
3 Tribunal does not have jurisdiction over any of the
4 claims set forth in the Request for Arbitration.
5 It observes that SGS has acknowledged that the
6 present dispute arises out of Pakistan's actions
7 and omissions with respect to the pre-shipment
8 inspection program and the PSI agreement. The
9 claims, irrespective of how SGS labels them, are
10 entirely contractual in nature.

11 So, that was the point being raised by
12 Pakistan to suggest that they did not--the Tribunal
13 did not have jurisdiction. The SGS position is at
14 page 332 on this point. Here, you will see at
15 paragraph 83--Mr. Chairman, do you have that?

16 It says SGS responds to Pakistan's
17 objections by firstly pointing out that it does not
18 accept the characterizations of SGS's claims as
19 contract defamation and BIT claims. All of SGS
20 claims are BIT claims in the sense that they are
21 brought before this Tribunal on the basis of the
22 BIT. And so, the Tribunal then deals with the

1 dispute between the parties on this key element.

2 And if you would then go to page 351, at
3 the bottom of page 351 is where the Tribunal deals
4 with characterization of the claims, and basically
5 concludes that at this point, i.e. at the time of
6 the jurisdictional motion, the characterization of
7 the claims by SGS is the key, and, of course, the
8 characterization of the claims by SGS in their
9 claim are BIT claims as opposed to contractual
10 claims under domestic law.

11 So then they go on to page 352 to go to
12 the key issue that was being dealt with by the
13 Tribunal, and as is indicated there, it's sub three
14 at the top of the page where it says, does the
15 Tribunal have jurisdiction to determine the
16 claimant's BIT claims, that is claims of violations
17 of certain provisions of BIT, and then it goes down
18 at paragraph 147, and that's where I would like to
19 start my reference. And it quotes. It says, "As a
20 matter of general principle, the same set of facts
21 can give rise to different claims grounded on
22 different legal orders, the municipal and

1 international legal orders. Both the claimant and
2 respondent in the present case do not dispute the
3 soundness of this proposition. In the event this
4 proposition has recently been discussed and
5 documented in extensio in the Vivendi Annulment
6 Decision where the Annulment Committee said--and
7 again, this is a quote from there, and this is of
8 importance to this differentiation we're making
9 here, as to the relation between the breach of
10 contract and breach of treaty in the present
11 case--it must be stressed that Articles 3 and 5 of
12 the BIT do not relate directly to breach of a
13 municipal contract. Rather, they set an
14 independent standard. A state may breach a treaty
15 without breaching a contract, and vice versa," and
16 this is certain true of these provisions of the
17 BIT. The point is made clear in Article 3 of the
18 ILC articles which is characterization of an act of
19 a state as internationally wrongful, and they quote
20 from that.

21 The characterization of an act of a state
22 is internationally wrongful as governed by

1 international law. Such characterization is not
2 affected by the characterization of the same act as
3 lawful by internal law. In accordance with this
4 general principle, which is undoubtedly declaratory
5 of general international law, whether there has
6 been a breach of the BIT and whether there has been
7 a breach of contract are different questions. Each
8 of those claims will be determined by reference to
9 its own proper or applicable law. In the case of
10 the BIT, by international law. In the case of the
11 concession contract, by the proper law of the
12 contract, in other words, the law of the province
13 that was in issue there.

14 For example, in the case of a claim based
15 on a treaty, international law rules of attribution
16 apply with the result that the State of Argentina
17 is internationally responsible for acts of its
18 provincial authorities. By contrast, the State of
19 Argentina is not liable for the performance of the
20 contracts entered into by the state which possesses
21 separate legal personality under its own law and is
22 responsible for the performance of its own

1 contracts.

2 The distinction between the role of
3 international and municipal law and matters of
4 international responsibility is stressed in the
5 commentary to Article 3 of the ILC Articles which
6 reads, in relevant part, as follows. Sub four, The
7 international court is often referred to and
8 applied the principal. For example, in the
9 reparation for injuries case, it noted as the claim
10 is based on the breach of an international
11 obligation on the part of the member held
12 responsible, the member cannot contend that this
13 obligation is governed by municipal law.

14 In the ELSI case, a chamber of the court
15 emphasized this rule stated that, and they quoted,
16 Compliance with municipal law and compliance with
17 the provisions of a treaty are different questions.
18 What is a breach of a treaty may be lawful in the
19 municipal law, and what is unlawful in the
20 municipal law may be wholly innocent of violation
21 of a treaty provision. Even if the Prefect held
22 the requisition be entirely justified in Italian

1 law, this would not exclude the possibility that it
2 was a violation of the FCN treaty.

3 Just because there has been a violation of
4 the municipal law of antidumping and CVD does not
5 necessarily mean that there has been a violation of
6 the standard under international law. Different
7 standards, different standards of review.

8 And then it goes on. Conversely, as the
9 chamber explained, the fact in an act of public
10 authority may have been unlawful in municipal law
11 does not--does not necessarily mean that an act was
12 unlawful in international law as a breach of a
13 treaty or otherwise. A finding of the local courts
14 that an act was unlawful may well be relevant to an
15 argument that it was also arbitrary, but by itself,
16 and without more, unlawfulness cannot be said to
17 amount to arbitrariness. Nor does it follow from a
18 finding of municipal court that an act was
19 unjustified or unreasonable or arbitrary, that that
20 act is necessarily to be classed as arbitrary in
21 international law. Though the qualification given
22 to the impugned act by the municipal authority,

1 i.e. the determination they make, according to the
2 municipal law and their standard, may be a valuable
3 indication.

4 The rule that the characterization of
5 conduct as unlawful in international law cannot be
6 affected by the characterization of the same act as
7 unlawful in internal law, makes no exception for
8 cases where rules of international law require a
9 state to conform to the provisions of its internal
10 law, for instance, by applying aliens the same
11 legal treatment as to nationals.

12 It is true in such a case compliance with
13 internal law is relevant to the question of
14 international responsibility, but this is not
15 because the rule of international law makes it
16 relevant, for example, by incorporating the
17 standard of compliance with internal laws to
18 applicable international standard or as an aspect
19 of it, especially in the fields of injury to aliens
20 and their property and of human rights, the content
21 and application of internal law will often be
22 relevant to the question of international

1 responsibility. In every case it will be seen on
2 analysis that either the provision of the internal
3 law are relevant as facts in applying the
4 applicable international standard or else they are
5 actually incorporated in some form conditionally or
6 unconditionally into that standard.

7 And then they go on. The Tribunal in this
8 case goes on to talk about the difference between
9 the BIT claims and the contract claims and then
10 again refer to the Avanti decision, which is on the
11 next page which states as follows. In a case where
12 the essential basis of a claim brought before an
13 international tribunal is a breach of contract, the
14 Tribunal will give effect any valid choice of forum
15 clause in the contract.

16 They go on. On the other hand, where the
17 final basis of the claim is a treaty laying down an
18 independent standard by which the conduct of the
19 parties is to be judged, the existence of an
20 exclusive jurisdiction clause in a contract between
21 the claimant and the respondent state cannot
22 operate as a bar to the application of the treaty

1 standard. At most it might be relevant as
2 municipal law will often be relevant in assessing
3 whether there has been a breach of a treaty.

4 It ultimately concludes in this case that
5 notwithstanding that the basis upon which the
6 conduct that's being complained about may involve a
7 breach of contract that at the end of the day,
8 notwithstanding the fact that SGS did pursue its
9 contractual claims in domestic courts, it was
10 allowed to proceed with its BIT claims because it
11 was a different proceeding, a different cause of
12 action based on a different standard and different
13 standards of review.

14 I would just like to refer to one--couple
15 of final passages that I would ask the Tribunal to
16 look at in this case, and they're in paragraphs
17 186, 186, and 188. I won't quote from them, but
18 again it deals with this context of the
19 interrelationship between domestic law and
20 international law and how the domestic law plays in
21 determinations and domestic law play into a BIT
22 claim.

1 So, if I just put this type of analysis
2 into the case that we are talking about here, just
3 because the facts, the factual matrix is related in
4 some way to the antidumping--to an antidumping or
5 CVD matter does not make them antidumping or CVD
6 claims. It just did not make them antidumping or
7 CVD claims. Those facts will be subjected to
8 review by this Tribunal according to the
9 international standards to determine whether or not
10 any of the measures is in violation--give rise to
11 the violation of an international law standard
12 recognized in Chapter 11.

13 And again, I go back to a point that I
14 understand we will be talking more about, but go
15 back to the point of 1121, Article 1121
16 specifically allows for an investor-state
17 arbitration to proceed at the same time as
18 proceedings by the same person in relation to the
19 same measures seeking extraordinary relief. It
20 envisages parallel proceedings, in our submission,
21 of the type that we have here.

22 PRESIDENT GAILLARD: Mr. Landry, at some

1 point will you also address the issue of whether or
2 not you can seek money, some kind of monetary
3 relief pursuant to Chapter 19, or do you agree that
4 this is something which can be asked? Because
5 there are two types of arguments. One is, is there
6 a possibility of duplication, and at one point you
7 said well, there is none because we cannot seek
8 monetary relief--again, I'm also vague on purpose
9 here--under Chapter 19 so there is not even a risk
10 of duplication. And on the U.S. side they said no,
11 you can get some money back, so it is--it does
12 create a risk of duplication. Are you going to
13 address that? I understand that there is another
14 level which is--it doesn't matter because it's a
15 different cause of action which you have just
16 developed now, but are you also going to address
17 the other aspect, or do you recognize there is a
18 risk overlapping under different umbrellas, if I
19 may put it this way?

20 MR. LANDRY: The simple answer to the
21 question, Mr. President, is that there are
22 no--there is no claim for damages being made in the

1 Chapter 19 proceeding.

2 PRESIDENT GAILLARD: What do you answer to
3 the fact--when they say yes, well, you could ask
4 your money back, there is some kind of refund which
5 may happen under Chapter 19, do you say, no, it's
6 not true, or do you say it's true, but it doesn't
7 matter because it's under a different rule or a
8 different norm that could happen?

9 MR. LANDRY: Let me try to answer it in
10 this way, Mr. Chairman, Mr. President.

11 Firstly, I can assure this Tribunal that
12 Canfor is not seeking double recovery. I can
13 assure the Tribunal of that.

14 PRESIDENT GAILLARD: In any event, that
15 would be a question for the merits, but I'm asking
16 on the theoretical level, I'm not saying anyone is
17 looking for a dual recovery or anything like that.
18 That would be for the merits, but at the moment I'm
19 thinking--I'm asking to you answer in a sort of
20 hypothetical manner to understand how these two
21 sets of rules interact.

22 MR. LANDRY: Let me try to answer that.

1 Firstly, as I indicated to you, there is no damages
2 in the Chapter 19 proceeding.

3 Secondly, Canfor is not seeking double
4 recovery, and it can assure this Tribunal that it
5 is not seeking double recovery. There is no
6 question that in the Chapter 19 proceeding the
7 quote that was raised by my friends in relation to
8 Canfor is correct. Assuming there is--that the ITC
9 order is ultimately set aside, Canfor has requested
10 that there be return of the duties.

11 But I would say this on that point,
12 Mr. President. Canfor is more than willing in this
13 proceeding to covenant that if it does get the
14 return of the duties back from the Chapter 19 Panel
15 process that it would not be claiming for those
16 duties here. In fact, if we could have the United
17 States assurance that if the extraordinary
18 challenge is dismissed and the matter set aside and
19 that the duties would be refunded in that case, in
20 that case we would withdraw the claim.

21 Secondly, in specific response, we could
22 do exactly, or this Tribunal could do exactly what

1 the Occidental Tribunal did in a very similar case
2 in relation to the same type of issue, and if I may
3 take you to the Occidental case to see how the
4 Occidental Tribunal dealt with this issue.

5 PRESIDENT GAILLARD: We are well aware of
6 that, but please go ahead, if you want to, but to
7 clarify your position you're saying yes, we can get
8 some money back. It's return of the duties, it's
9 not damages, but it's an Article 1121(1)(b)
10 problem, and it's not a problem of fundamental
11 inconsistency between the two chapters. Is that a
12 fair characterization of your position?

13 MR. LANDRY: What I would like to do is
14 refer you to the Occidental case, and Professor
15 House, I think, can respond a bit more specifically
16 to that question, but could I just take to you
17 see--

18 PRESIDENT GAILLARD: Forgive me if I'm
19 disrupting the order of your presentation. Maybe
20 we should refrain in asking questions.

21 MR. LANDRY: No, no, we would like to
22 respond specifically to that, so if I could just

1 take to you the Occidental case which is at Tab 8
2 of the rejoinder brief of authorities,
3 Mr. President, in that case that was a--this is a
4 tax-related case by Occidental against Ecuador, and
5 in that case there were two different types of
6 proceedings that were ongoing. There were domestic
7 proceedings, and there was a BIT claim being made,
8 and there was the possibility that in the domestic
9 proceedings that they were successful that they
10 would have to be return of certain taxes that were
11 being claimed by the Occidental company. And so if
12 you go to page 73 of the decision, after they
13 awarded Occidental the damages, which included the
14 taxes which had been paid, they dealt with this
15 difficulty that you're talking about in paragraph
16 10 of the order.

17 Do you see that, Mr. President?

18 PRESIDENT GAILLARD: Yes.

19 MR. LANDRY: And I quote. It says, In
20 order to clearly forestall any possible double
21 recovery of value-added tax by Occidental, the
22 Tribunal holds that Occidental shall not benefit

1 from any additional recovery, directs the claimant
2 to cease and desist from any local court actions,
3 administrative proceedings or other actions seeking
4 refund, et cetera.

5 And Canfor is looking to get the duties
6 paid back, not twice. Once. And the information
7 that we have is that the United States is going to
8 be taking the position if the extraordinary
9 challenge is successful--is not successful, sorry,
10 that the duties will not be paid back. But on the
11 assumption that the extraordinary challenge is
12 found not to be successful, and the U.S. could
13 assure us that that are going to give the duties
14 back, that part of the claim would be withdrawn.

15 But in any event, we would be willing to
16 agree to any reasonable covenants to assure that
17 there was no double recovery.

18 And then I would ask Professor House if he
19 could respond to your specific question.

20 PRESIDENT GAILLARD: Yes, Also, tell us at
21 which point you want to break. We are not going to
22 interrupt because it's for you to choose what's the

1 best time to have a break in the afternoon. It's
2 really up to you. You tell us. Maybe now, maybe
3 later. We don't mind.

4 MR. LANDRY: We will.

5 Professor Howse.

6 PROFESSOR HOWSE: I believe that
7 Mr. Landry has now mostly addressed the question in
8 the same way that I would. I would just add one
9 footnote, which is to make it clear that the powers
10 of a Chapter 19 Tribunal under NAFTA do not include
11 the power, as we understand it, to make an order
12 for the refund of duties that have been collected
13 on the basis of an interpretation or application of
14 U.S. countervailing duty or antidumping law that
15 has been determined by that panel to be illegal or
16 improper.

17 We are of the view that there is state
18 responsibility under the NAFTA for the United
19 States to return duties that have been illegally
20 collected, but the fact of the matter is that given
21 the limited powers that are conferred on the NAFTA
22 Chapter 19 Panels, those panels cannot make an

1 enforceable order, and indeed, arguably no specific
2 order at all for refund of the duties, and
3 therefore to enforce the requirement under
4 international law to return monies illegally taken
5 would require either relying on the good offices of
6 the United States which, to our understanding,
7 takes the position that they don't have to refund
8 the duties as part of their state responsibility,
9 or it's unclear what remedy could be had to have
10 the United States perform that responsibility to
11 refund duties illegally taken. We just don't see
12 that we have another remedy available under the
13 language of the NAFTA, as I say, except to point
14 out to them that it is a legal responsibility to
15 restore funds taken not in accord with law, and
16 that really isn't sufficient.

17 So, we are here today making a claim that
18 is under Chapter 11 for--that includes restitution
19 of the duties, but as Mr. Landry said, if the
20 United States were to change its position or to
21 clarify its position and to state unequivocally
22 that it's under responsibility to refund those

1 duties, if they're found under Chapter 19 to have
2 been collected illegally, that would alter the
3 nature of our claim because, as Mr. Landry stated,
4 we have no intention to ask for anything like
5 double recovery.

6 PRESIDENT GAILLARD: I understand that in
7 limited terms you don't want double recovery, but
8 is it correct that the position of Canfor on this
9 is that it is either the question for the merits to
10 avoid unfair results or duplication of payments
11 like tribunals may take into account--in the
12 context of illegal taking they may take into
13 account some monies which were partially paid, but
14 it's not the proper measure of the expropriation,
15 but they do take it into account as a fact? That's
16 one aspect. Or in the context of NAFTA, it may be
17 dealt with as an Article 1121(1)(b) problem, a
18 waiver problem. Is that your legal position?

19 MR. LANDRY: Could I have just one moment,
20 Mr. President?

21 PRESIDENT GAILLARD: Again, that's
22 something we can discuss tomorrow, but I just want

1 to have both parties make their position very
2 clear, and I think it's for Canfor Corporation to
3 start to have a position clear on this, and then
4 the U.S. would be able to answer.

5 My intention is not to rush you in any
6 way, but that's something we would like to discuss.

7 MR. LANDRY: Mr. Chairman, we would like
8 to consider that position. I think we would like
9 to get through that issue in the sense that
10 Professor Howse has indicated and I have indicated,
11 Canfor is not here in an attempt to try to get
12 double recovery.

13 PRESIDENT GAILLARD: That's what I
14 understand, but then we want further elaboration on
15 the more legal juridical level.

16 MR. LANDRY: I understand that, and we
17 will consider that overnight, and provide a
18 position for the Tribunal tomorrow.

19 PRESIDENT GAILLARD: Thank you.

20 ARBITRATOR WEILER: So I understand what
21 we are after, it's one issue whether you're after
22 or not after double-dipping, but at some point it

1 seemed that you were arguing that these are two
2 different causes of action, and therefore there was
3 no possibility of overlap or doubled, and then
4 suddenly it emerged that in fact, there might be a
5 possibility because one had to resort to the
6 extraordinary device of saying that if we gain in
7 one we will not take in the other, et cetera.
8 That's where we would seek clarification, because
9 at some point at least, it seemed for you to say
10 these are two mutually exclusive proceedings.

11 PRESIDENT GAILLARD: I guess you no longer
12 say that. I mean, at some point in your pleadings
13 you say, well, there is no risk of duplication
14 simply because under Chapter 19 there is no money
15 back. I mean, in general terms, no money back. No
16 damages. Then the U.S. says, well, no damages, is
17 too simple an answer because there may not be
18 damages, but it may be money back, nonetheless,
19 because it may lead to the return of the duties.

20 So, there is some kind of, they say, I'm
21 not taking sides here, they say there is some risk
22 of monetary duplication. And your answer now is

1 that may be the case, but it's no different as the
2 kind of duplication you may have when you receive
3 something from a local court in a BIT situation,
4 you receive some money from a local court. It's
5 not good enough; therefore you say I have been
6 expropriated. I need the fair price of my
7 property, and I'm seeking to get the difference.
8 No double accounting here, I'm seeking to get the
9 difference before an international tribunal.
10 That's one answer which we understand. We don't
11 say it's right or wrong, but we understand that
12 answer.

13 We believe that there is also another
14 level which is simply due to the specific language
15 of NAFTA which, of course, does object exist when
16 you refer to Occidental or SGS Pakistan. You have
17 this waiver issue, and that's another--the same
18 facts must be addressed with respect to the waiver
19 requirement, and you say yes, but it's a question
20 of the waiver, and we said we are not going to
21 address it at this point. The U.S. has reserved
22 their rights on this, but I take it that you're

1 saying that on a more fundamental level, even if
2 all that has to be taken into account and sorted
3 out one way or the other, on the conceptual level
4 there is no risk of duplication between 19 and 11
5 because it's two different causes of action, the
6 nature of the rights in dispute is different, and
7 that's your answer on a conceptual level, which you
8 developed earlier; is that correct?

9 MR. LANDRY: That's correct.

10 PRESIDENT GAILLARD: Thank you. So, we
11 will hear more about that tomorrow.

12 MR. LANDRY: We will hear more about that
13 tomorrow, and of course at the end of the day we're
14 talking somewhat in terms of damages in this
15 proceeding, and we will have to prove our damages,
16 whatever they may be.

17 PRESIDENT GAILLARD: Right. That's for
18 the merits phase, if any. So, we understand all
19 that. Thank you.

20 You may proceed or call for a pause at any
21 time. I don't know how the parties feel about
22 that.

1 The Court Reporter would like to have a
2 pause, and I think that's understood. So, we pause
3 now for what? 15 minutes would be good enough?

4 MR. LANDRY: 15 minutes.

5 PRESIDENT GAILLARD: 15 minutes, thank
6 you.

7 (Brief recess.)

8 PRESIDENT GAILLARD: We resume the
9 hearing, and, Mr. Landry, you have the floor.

10 MR. LANDRY: Mr. President, we considered
11 the issue that was raised just prior to the break,
12 and what we will endeavor to do is to have a more
13 complete and concise answer to the issues that you
14 raised regarding that tomorrow, if that's okay with
15 the Tribunal.

16 PRESIDENT GAILLARD: That's perfectly
17 fine. That's exactly why we asked the questions,
18 to raise certain issues and have you think about
19 it, and we will discuss it further tomorrow.
20 That's perfectly fine.

21 MR. LANDRY: And on that basis I would
22 like to turn over the microphone to my friend,

1 Mr. Mitchell, to continue the balance of the
2 submissions, subject to any questions that the
3 Tribunal might have.

4 PRESIDENT GAILLARD: The Tribunal has a
5 few questions to you because it relates to what you
6 said before the pause. We asked the questions now
7 being understood that you may want to answer
8 briefly now, or you may tell us that you will
9 answer those questions tomorrow, and that will be
10 equally acceptable, of course. Joseph, do you want
11 to start.

12 MR. WEILER: So, while the usual caveats
13 apply to the question, and it's really trying to
14 clarify it to make sure that I understand fully the
15 positions you're taking.

16 In reply to the Chairman's question, and I
17 think I understood that you said that a violation
18 of the domestic law was not necessary in order to
19 have a violation of international legal obligation,
20 although it might be relevant, something unlawful
21 could be probative to showing that something was
22 also arbitrary, but it does not necessarily follow

1 that anything that's unlawful is arbitrary, et
2 cetera.

3 So, just to press this and better to
4 understand the concept that you are putting to us,
5 would it be the case that it might even be that the
6 antidumping measures of a NAFTA party, and I think
7 we should really for a moment in order to
8 understand the conceptual apparatus, leave the
9 particular circumstances of the Canfor case and
10 just think about it, the antidumping or
11 countervailing duty measures of a NAFTA party, be
12 it Canada, the United States, or Mexico, might not
13 violate Canadian, Mexican, or United States law,
14 respectively, and in that respect might even be
15 fully consistent with Chapter 19 globally. In
16 other words, that a Chapter 19 Tribunal--a panel
17 would appropriately, in other words, it wouldn't be
18 a claim that they in some way erred, found that
19 there was no Chapter 19 violation, but do I
20 understand your position correctly that you would
21 say even in those circumstances there might be
22 situations where the antidumping measures or

1 countervailing duty measures might constitute a
2 violation of Article 11? If this is the case, it
3 would really be helpful for me to have examples
4 which are not necessarily from the Canfor case, in
5 other words not to argue by what they did to us,
6 et cetera, but give an example, maybe tomorrow, of
7 antidumping violations putative antidumping or
8 countervailing duty violations of say the Canadian
9 government which would be consistent with Canadian
10 law which would, in your view, not be inconsistent
11 with Chapter 19, and yet where you would have
12 thought that both Mexico and/or the United States
13 may have a reasonable party for an investor on
14 Mexico, an investor from the United States or the
15 United States Government, or Mexico under Chapter
16 20 would have a reasonable claim to say, although
17 they are compliant with Canadian law and we are not
18 claiming that there is a violation of any aspect of
19 Chapter 19, nonetheless they violate some other
20 obligation. To me, that would clarify things, and
21 I would find it helpful if you could maybe tomorrow
22 discuss this more at length and give some examples.

1 And setting aside the particular conduct
2 whether what happened in the Canfor case represent
3 that type of situation. That's my first question.

4 My second question is also maybe for
5 reflexion for tomorrow just to flag it, does the
6 recent Loewen case have any bearing on this? The
7 reason I ask this, and I really am asking, does it
8 just have a bearing on it, because even if there is
9 a different cause of action, and it's a different
10 legal obligation, which according, if I understand
11 your concept correctly, there is one that informs
12 the Chapter 19, and another that would inform a
13 Chapter 11 or a Chapter 20, if it were a state
14 claimant, it flows from the same acts, so to speak.

15 And then we saw also that there can be,
16 and consistent with what the Chairman said, there
17 can be some feature of duplication, and you were
18 very careful to say it in this particular case,
19 Canfor is not--certainly will not claim both
20 things.

21 Is Loewen in any way pertinent in
22 suggesting that since the acts that give rise to

1 your--to a would-be claim under Chapter 11 or if
2 it's a state thing under Chapter 20 originated in
3 an AD/CVD, that that has to be exhausted in some
4 way or completed before you--it's only if you
5 didn't get relief and you didn't get any of the
6 money back, and therefore you could quantify your
7 damages, et cetera, then you would move to a
8 Chapter 11 or a Chapter 20. But in that respect
9 the Chapter 19 procedure should be taken like the
10 legal procedure in the law, and that has to be
11 completed before the cause of action in Chapter 11,
12 assuming, of course, your construct is correct, and
13 of course we have not taken any decision of that
14 would be triggered, so I would be interested if you
15 could respond to that. Thank you.

16 Those were my two questions.

17 PRESIDENT GAILLARD: In fairness, that's
18 more questions for tomorrow than to answer
19 immediately, I would guess, but not to preclude an
20 answer now, but--

21 MR. LANDRY: I would like to do a better
22 job in terms of answering that, and I know

1 Mr. Mitchell has some time that will take us for a
2 while, so perhaps the best way to respond would to
3 be say we will respond more fully tomorrow to both
4 those points, Professor Weiler, and I understand
5 them both very well, and I do have an answer, but
6 it would take some time to develop them with you,
7 so I think I will defer until tomorrow so it could
8 be a little more concise on them.

9 PRESIDENT GAILLARD: I think it makes
10 sense.

11 Mr. Harper also has a few questions in the
12 same spirit of asking the question now to make the
13 debate tomorrow more interesting.

14 ARBITRATOR HARPER: Thank you,
15 Mr. President.

16 Mr. Landry, let me just put a few things
17 before you, and as the President has indicated, if
18 you would feel more at ease in responding tomorrow,
19 that certainly is appropriate.

20 Are the actions of the U.S. Commerce
21 Department and the ITC as alleged in the Statement
22 of Claim administrative practice under antidumping

1 law and countervailing duty law? That's question
2 number one.

3 MR. LANDRY: Mr. Harper, first of all, the
4 issue of administrative practice I know is going to
5 be dealt with by Mr. Mitchell, so I would like to
6 defer that question, and I thank you for the
7 question, but I know he's going to deal
8 specifically with that, and I will allow him to
9 elaborate on that point.

10 ARBITRATOR HARPER: Is the Byrd Amendment
11 an antidumping law? Is the Byrd Amendment a
12 countervailing duty law?

13 MR. LANDRY: Well, Mr. Harper, that's a
14 very good question, and I'm not sure I heard an
15 answer to the question this morning. I would say
16 this, to my understanding in reading the material
17 that was presented by the United States to the WTO,
18 they, I think, would answer that question it is not
19 an antidumping or CVD law, and so it's hard for me
20 to contemplate how it is not in some fashion
21 related to antidumping and CVD, but it was my
22 understanding that that was the position that was

1 taken by the United States in the WTO.

2 Now, that can be clarified somewhat, but--

3 ARBITRATOR HARPER: I guess I'm asking,
4 though, what the position of Canfor is about that
5 statute.

6 MR. LANDRY: Well, I think the position of
7 Canfor is that it is clearly a matter that relates
8 to the antidumping and CVD regime that they have in
9 place.

10 ARBITRATOR HARPER: Does Canfor allege
11 that municipal norms and standards are not part of
12 Chapter 11?

13 MR. LANDRY: They're not part of Chapter
14 11 in the sense that those are the norms or
15 standards that are reviewed by the--by this
16 Tribunal in Chapter 11. So, determinations by
17 domestic tribunals that would effectively be done
18 according to municipal standards and municipal
19 standards may be relevant in the context of a
20 Chapter 11 claim, but this Tribunal does
21 not--applies international law standards, not
22 domestic law standards.

1 ARBITRATOR HARPER: Would an order by
2 this--I'm sorry, Mr. Chairman.

3 PRESIDENT GAILLARD: Just for the record,
4 the record, I guess, will reflect the fact that we
5 have a question and an answer. I don't mean to,
6 because here it seems like it's only a question, so
7 we have to be clear that there is a question and
8 the rest of the language is the answer.

9 MR. LANDRY: I take it the reporter has
10 made note of that.

11 ARBITRATOR HARPER: Mr. Landry, would an
12 order by this Tribunal that the U.S. repay the
13 duties that Canfor has paid be an obligation
14 imposed on the U.S.?

15 MR. LANDRY: Imposed on the U.S., and I
16 assume you're asking that imposed on the U.S. in
17 the sense of imposing an obligation under 1901(3).
18 Is that--

19 ARBITRATOR HARPER: Yes.

20 MR. LANDRY: First of all, the Tribunal
21 cannot order that. The only order that this
22 Tribunal can order is a payment of damages. In

1 other words, that's the only claim that's allowed
2 under Chapter 11.

3 ARBITRATOR HARPER: That was going to be
4 my next question.

5 MR. LANDRY: That's not something that can
6 be ordered. You have to basically determine
7 damages. And the issue of what 1901(3) what type
8 of obligation imposes is obviously the issue that
9 my friend, Mr. Mitchell--my colleague Mr. Mitchell
10 will be dealing with.

11 ARBITRATOR HARPER: Well, let me just put
12 it on the record. The question would be, would an
13 order by this Tribunal that the United States pay
14 damages to Canfor be an obligation imposed on the
15 United States? And I take it you're telling me
16 that Mr. Mitchell is going to address that
17 question?

18 MR. LANDRY: Yes, but clearly the answer
19 to that is based upon our interpretation of--if
20 you're talking about specifically in relation to
21 Article 1901(3), our interpretation is that that
22 would not be such an obligation imposed as

1 envisaged under 1901(3).

2 ARBITRATOR HARPER: Is it Canfor's
3 position that the only claims in the statement of
4 claim and nothing else are the matters subject to
5 the U.S. objection on jurisdiction?

6 MR. LANDRY: I'm sorry, I'm not sure I
7 understand the question, and I don't want to
8 respond to a question I'm not sure I understand.

9 ARBITRATOR HARPER: That's certainly wise.
10 Let me see if I could adumbrate it.

11 During your argument today and in the
12 papers submitted by Canfor, we have been told of a
13 number of actions taken by the United States that
14 are not pleaded in the statement of claim. Are you
15 with me so far?

16 MR. LANDRY: Yes.

17 ARBITRATOR HARPER: I'm trying to find out
18 whether, in effect, Canfor is asking for anything
19 more than what it pleaded for in the statement of
20 claim; namely, that it's only the statement of
21 claim--statements of claim and nothing else that
22 are the matters addressed by the U.S. objection on

1 jurisdiction.

2 MR. LANDRY: If I could just have a
3 moment.

4 (Pause.)

5 MR. LANDRY: Obviously, Mr. Harper, the
6 relative to the jurisdictional motion you have the
7 statement of claim as is. The evidence that will
8 be brought forward that will be used to show that
9 the conduct of the United States has effectively
10 violated the international norms that we say they
11 have violated, will depend at the time on when we
12 come to work with the Tribunal on the merits. And
13 at that point in time, the evidence will be brought
14 forward will effectively be evidence up to the time
15 that we are before the Tribunal.

16 PRESIDENT GAILLARD: Mr. Landry, are you
17 sure this is right? You want to reflect on that?
18 Because my understanding at reading your documents,
19 your briefs, is that your initial statement of
20 claim has been somewhat amended. Maybe implicitly,
21 in particular by your latest submission called the
22 Rejoinder on Jurisdiction of September 24, '04, and

1 I can quote a number of pages in which you sort of
2 at least of the date the situation and possibly
3 amend or at least supplement your position on this.
4 So, I don't want you to--I don't want to put words
5 in your mouth, of course, but I would since what
6 you just said doesn't seem to be consistent with
7 the record, I would urge to you think about it.

8 And maybe we will give you time to clarify
9 your position in writing, because that's something
10 I want--one concern we have, and let me raise the
11 question right now is that we want to know what is
12 requested and what is in front of us, and that's
13 one of the questions which belong to a series of
14 questions geared at establishing that. You have
15 seen it, a number of questions this morning and
16 this afternoon as to what is in front of us today,
17 and there is some, in my view, some gray area here.
18 So, if you tell us the request is the request,
19 that's--the rest is evidence of the same thing,
20 that's one thing. Has it been updated or
21 supplemented? It's another answer. I don't know
22 which is right. And in any event, we want the

1 respondent to comment on this also. So, please
2 just note the question for the time being, and
3 that's one thing we want to discuss tomorrow.

4 MR. LANDRY: We do a more thorough answer
5 to the question tomorrow on that, Mr. Harper, and
6 taking into account the President's comments
7 because I think it goes beyond, quite frankly
8 beyond Mr. Harper's question, and it's important,
9 and we will respond to that.

10 ARBITRATOR HARPER: Actually, the
11 President did not go beyond my question. Exactly
12 what he's talking about is the fulcrum upon which
13 the question is based. I do want to know, we all
14 want to know what it is that's before us.

15 MR. LANDRY: And I understand it,
16 Mr. Harper, and now that it's been articulated in
17 the that way, we will provide a full response to
18 that question.

19 ARBITRATOR HARPER: I have one final
20 question, if I may, Mr. President.

21 PRESIDENT GAILLARD: Please, certainly.

22 ARBITRATOR HARPER: Is it Canfor's

1 position that all of the treatment of which Canfor
2 complains is rooted in determinations by the U.S.
3 Commerce Department and by the ITC and the Byrd
4 Amendment?

5 MR. LANDRY: When you say determination,
6 you're talking about formal determinations?

7 ARBITRATOR HARPER: I'm talking
8 specifically, and you brought our attention to it
9 in your statement, to--with respect to the
10 preliminary determinations and other things set
11 forth in the Statement of Claim. You talked
12 particularly about paragraphs 20 and 109, and I'm
13 simply trying to be sure that I understand the
14 outer boundaries of the treatment and conduct and
15 other general words that Canfor has used.
16 Sometimes--in fact, I'll go further and say many
17 times in the submissions by Canfor words like
18 treatment and conduct are used unanchored to any
19 specific claims.

20 And what I'm trying to make sure of, and
21 to find out what Canfor's position is, is whether
22 or not all, without exception, of Canfor's

1 allegations about wrongful conduct or treatment by
2 the United States Government, in fact, are rooted
3 in the administrative actions of the Department of
4 Commerce and the ITC and the Byrd Amendment.

5 MR. LANDRY: I think that to a certain
6 extent Mr. Harper is related to the previous
7 question.

8 ARBITRATOR HARPER: It is, indeed.

9 MR. LANDRY: And I believe to properly
10 answer it, because there is a crossover, and we
11 will take that under advisement. It's all of the
12 conduct. Now, the question is you've asked a more
13 specific one, a specific point on that which I do
14 understand and will respond to that again tomorrow.

15 PRESIDENT GAILLARD: In the same spirit of
16 flagging questions for an answer tomorrow, we have
17 a number of questions on the Byrd Amendment. I
18 don't mean to ask them now, but you should be
19 prepared to be grilled on the Byrd Amendment, and
20 that goes for both sides.

21 MR. LANDRY: Okay.

22 PRESIDENT GAILLARD: Maybe you want to

1 resume, and Mr. Mitchell?

2 MR. LANDRY: Mr. Mitchell will now--

3 PRESIDENT GAILLARD: To present the case
4 on behalf of Canfor Corporation.

5 Thank you, Mr. Landry.

6 MR. MITCHELL: Thank you, Mr. President.
7 Members of the Tribunal, the focus of my submission
8 is going to be on the proper or the correct
9 interpretation of Article 1901(3), and the textual
10 and other considerations which on the one hand
11 support Canfor's interpretation and correspondingly
12 those textual and other considerations which
13 demonstrate that the United States submission
14 cannot prevail.

15 Before doing so, I want to make some
16 general remarks about the Tribunal's jurisdiction
17 on this motion. First, it is not contended by the
18 U.S. on this motion that Canfor has not satisfied
19 every jurisdictional hurdle contained within
20 Chapter 11 itself. Rather, the essence of the U.S.
21 submission that we have to deal with today is that
22 although for the purposes of this motion, Canfor

1 has properly established the jurisdiction of the
2 Tribunal based on the four corners of Chapter 11,
3 its claim is barred on the basis of a provision of
4 another chapter, namely Article 1901(3), that on
5 its face does not mention jurisdiction at all, that
6 does not mention Chapter 11, does not mention
7 Chapter 11 dispute settlement, or, indeed, dispute
8 settlement at all, and is not, on its face, drafted
9 in a manner that would appear to be a choice of
10 forum clause, like Article 2005, or a reservation
11 clause as those clauses are drafted throughout the
12 treaty.

13 Second, this claim must be put within its
14 context, and if the point is not abundantly clear
15 by now, we will reiterate it. This claim is not
16 about measuring the United States's conduct against
17 its municipal law standards, but rather the essence
18 of Canfor's claim is that the conduct of which it
19 complains, the arbitrary, discriminatory,
20 discretionary, abusive, and politically motivated
21 conduct which targets Canfor and investors like it
22 has failed to meet the standards to which the

1 United States has committed itself at the
2 international plane, and indeed the standards which
3 the United States must comply with at customary
4 international law.

5 Third, Canfor has not brought this claim
6 lightly. Chapter 11 claims are difficult and are
7 expensive, and by their very nature challenge the
8 actions of a government and, indeed, the government
9 of a country with which Canada has extremely
10 friendly relations and a country in which Canfor
11 has invested literally hundreds of millions of
12 dollars.

13 Canfor has not brought this claim to solve
14 the softwood lumber dispute at large, a dispute
15 which has plagued relations between Canada and the
16 United States for decades. Rather, Canfor has
17 brought this claim because as an investor in the
18 United States, it has suffered direct and severe
19 effects of the United States's conduct towards it.
20 Canfor has taken the extraordinary step of bringing
21 this proceeding because of the extraordinary
22 circumstances that give rise to it, including

1 conduct of the United States which has repeatedly
2 been condemned by binational and international
3 tribunals as inconsistent with both the municipal
4 law and international law responsibilities of the
5 United States, which has included delaying or
6 wholly failing to remedy violations of such
7 responsibilities, and which has included organs of
8 the United States Government floating or ignoring
9 the rulings of properly constituted tribunals so as
10 to completely undermine the Chapter 19 dispute
11 resolution context.

12 Canfor agrees with Mr. Taft's comment when
13 he said that this is a case of immense importance.
14 It is a case of immense importance to Canfor. It
15 is in that context I make the submissions that
16 follow.

17 My submissions proceed on the following
18 basis. First I'm going to state what I say the
19 proper interpretation is of Article 1901(3).
20 Second, I'm going to review the textual and other
21 factors that in my submission support the
22 interpretation I espouse. In the course of that I

1 will refer to the textual and other factors that
2 again in my submission demonstrate that the
3 approach of the United States cannot prevail.
4 Where possible, I'll try and provide you with
5 references to our memorials and where the
6 submissions are advanced in more detail.

7 But suffice it to say that it goes without
8 saying that in addition to the submissions advanced
9 orally, we continue to stand upon the submissions
10 contained in our memorials, and where those more
11 fully elaborate our submissions, we rely upon them.

12 PRESIDENT GAILLARD: That's absolutely
13 clear to us.

14 MR. MITCHELL: So, let me turn to the
15 proper interpretation.

16 In Canfor's respectful view, Article
17 1901(3) means nothing more and nothing less than
18 the no provision of the chapter of the NAFTA other
19 than Chapter 19 imposes a duty or a responsibility
20 or an obligation on a NAFTA party to do something
21 or not do something such as amend or not amend that
22 party's countervailing duty or antidumping duty law

1 as those terms are specifically defined in Article
2 1901--1902(1). That submission is made in
3 particular in paragraphs 126 and 127 of our
4 memorial, and paragraph 26 of our rejoinder.

5 Now, why do we say this is so? I have
6 several points. My first point is based on the
7 plain meaning, we say, of the terms actually used
8 in Article 1901(3). Now, it's interesting but not
9 uncommon for opposing parties to advance
10 diametrically opposed plain meanings of a
11 provision, each contending that theirs is obvious
12 and that that advanced by the other side is
13 untenable. That, indeed, is the tenor of the
14 United States's submission and to some extent the
15 tenor of ours.

16 What I say, however, is that the textual
17 factors that I'm going to refer to demonstrate that
18 there are compelling reason why is the plain
19 meaning advanced by the claimant should prevail.
20 And the starting point is this: The starting point
21 is that on its face, Article 1901(3) is confined in
22 its application to a specifically defined phrase,

1 antidumping duty law and countervailing duty law.

2 This, we say, manifests a deliberate
3 choice and a clear indication, clear statement of
4 the intention of the parties that the operation of
5 Article 1901(3) was limited in ambit to the subject
6 matter specifically defined in Article 1902;
7 namely, the parties' antidumping duty laws and
8 countervailing duty laws which are defined as
9 appropriate for each party, relevant statutes,
10 legislative history, regulations, administrative
11 practice, and judicial precedence.

12 Now, by using a specifically defined term
13 in Article 1901(3), the parties obviously turned
14 their mind to what they intended that provision to
15 apply to. Clearly, it was intended to apply to the
16 antidumping and countervailing duty laws as
17 specifically defined.

18 Now, Mr. Harper questioned Mr. Clodfelter
19 and Ms. Menaker on the meaning of antidumping duty
20 law and countervailing duty law, and there was a
21 discussion of whether a determination, be it a
22 preliminary determination, a final determination is

1 administrative practice and, therefore, within the
2 definition of countervailing duty law or
3 antidumping duty law.

4 Let me say clearly that it is the
5 submission of Canfor that a determination is not in
6 any sense an antidumping duty law or a
7 countervailing duty law as that term is defined in
8 the treaty.

9 And so, I'm a little lower tech than most
10 people, and so I'm actually relying on the hard
11 text of the treaty, but if you were to look at
12 Article 1902(1), where antidumping duty law and
13 countervailing duty law is first defined, you see a
14 commonality amongst the terms that are used in
15 defining the scope or ambit of what is meant.
16 First, you see relevant statutes and legislative
17 history. So, for instance, in the United States
18 the legislative history would include the statement
19 of administrative action. Then you see
20 regulations, administrative practice, and judicial
21 precedents.

22 The commonality or the common element

1 within those provisions is that they relate to the
2 rules to be applied in arriving at a particular
3 determination. They relate to, in other words, the
4 normative standards that a decision maker, be it in
5 Canada, the United States, or Mexico, would apply.

6 And I ask you to note that in defining
7 antidumping duty law and countervailing duty law,
8 there is no mention of a decision in a particular
9 case or a determination; and, indeed, I can
10 contrast Article 1902(1) where there is a
11 definition of what is meant by antidumping duty law
12 with Article 1904(2).

13 And so, 1904(2) is just over the page, but
14 it says, in its introductory words, An involved
15 party may request that a panel review based on the
16 administrative record--may request that a panel
17 review, based on the administrative record, a final
18 antidumping or countervailing duty determination of
19 competent investigating authority of an importing
20 party to determine whether such determination was
21 in accordance with the antidumping or
22 countervailing duty law of the importing party.

1 That is, the determination is measured against the
2 rule or standard to determine whether it complies
3 or not.

4 And so, if I take a step back to Article
5 1902(1), where we have the first definition of
6 antidumping law or countervailing duty law, I note
7 again the use of the phrase "judicial precedents"
8 at the end. Judicial precedent is used instead of
9 another term such as judicial decision or again
10 determination. The significance of a precedent is
11 once again that it relates to the rules to be
12 applied by the decision maker. And so, a
13 determination or outcome in a particular case may
14 over the course of time become part of the body of
15 precedent that then would embody law, but a
16 determination in a case that is subject to
17 challenge or in circumstances where that conduct is
18 subject to challenge, is not law, as that term is
19 defined.

20 So, when you look at administrative
21 practice, Ms. Menaker said, well, yes, to
22 paraphrase, a determination is administrative

1 practice, that's said without any authority in
2 support, but my submission would be to the
3 contrary: Administrative practice would be rules
4 or guidelines or procedures established that the
5 parties could follow in a particular case leading
6 up to a determination. They do not, in my
7 submission, relate to a determination in any
8 particular case.

9 The second textual factor that I want to
10 look at in Article 1901(3) is the use of the term
11 "law," and in my submission this is an extremely
12 important term that the parties chose to use when
13 agreeing upon the text of Article 1901(3). They
14 chose to say that Article 1901(3) shall not be
15 construed as imposing obligations on a party with
16 respect to the party's antidumping law or
17 countervailing duty law.

18 Now, the parties could have said if they
19 wanted something of broader ambit that no provision
20 of any other chapter of the NAFTA shall be
21 construed as imposing obligations on a party with
22 respect to its AD or CVD measures. They could have

1 used the term "measures." But, by using "law" in
2 place of "measure" in Article 1901(3), the parties
3 intended and demonstrated a clear intention that
4 they intended that Article 1901(3) was to be of
5 narrower ambit than the United States contends.

6 Why do I say this? I have two main
7 points. First, measure is a well understood term
8 in international law. It is recognized as broader
9 simply than a law. Indeed, it refers to any act
10 attributable to a state according to the applicable
11 law of state responsibility. This is not a point
12 that has not been litigated before in the Chapter
13 11 context, and at paragraphs 15 and 16 of our
14 rejoinder, we reference some of those other
15 authorities.

16 Now, I'm not going to take you--copies of
17 all the cases are obviously in the authorities we
18 provided, and I'm not going to take you directly to
19 them, but I do want to highlight some of these
20 provisions.

21 So, in one of the earliest, in fact, it
22 may have been--it was probably the second Chapter

1 11 arbitration, the ethyl case, in the motion on
2 jurisdiction the Tribunal endorsed a broad
3 interpretation of the word "measure," and the
4 context there was an express discussion of the
5 difference between a law and a measure. And the
6 Tribunal said this, and just for references at the
7 top of page nine of our rejoinder, "In addressing
8 what constitutes a measure, the Tribunal notes that
9 Canada's statement on implementation of the North
10 American Free Trade Agreement states that, quote,
11 the term measure is a nonexhaustive definition of
12 the ways in which governments impose discipline in
13 their respective determinations. This is borne out
14 by Article 201(1) which provides measure includes
15 any law, regulation, procedure, requirement, or
16 practice. So, again, measure and law are used in
17 contra distinction to one another.

18 Continuing the quote, Clearly something
19 other than a law, even something in the nature of a
20 practice, which may not even amount to a legal
21 stricture may qualify.

22 The issue was raised again in the Loewen

1 case, and the term "measure" was described as,
2 quote, embracing any action which affects the
3 rights of persons coming within the application of
4 the relevant treaty provision.

5 Now, I should say this, and I have
6 included a reference to this at note 14. The
7 United States in the course of negotiations of
8 Chapter 11 was insistent upon a--an agreement that
9 the term "measure" be considered such a term that
10 could embrace even individual actions, a single
11 action could amount to a measure as is consistent
12 with the general international law.

13 And so, a measure has to be understood in
14 contra distinction to simply a law.

15 Now, when you start from that proposition
16 that there is a well recognized difference between
17 a measure and a law--

18 PRESIDENT GAILLARD: Mr. Landry, could I
19 interrupt you at this stage. Since we are at it,
20 you have in front of you your second, your
21 rejoinder, second memorial at paragraph 16.

22 MR. MITCHELL: Yes.

1 PRESIDENT GAILLARD: You talk about, you
2 contrast the measures and the parties' laws,
3 plural.

4 Do you see that?

5 It's paragraph 16 on page nine.

6 MR. MITCHELL: Yes.

7 PRESIDENT GAILLARD: And then you say, but
8 also in a manner and conduct of a party in the
9 application of purported application of such laws,
10 plural.

11 Do you see that?

12 MR. MITCHELL: Yes.

13 PRESIDENT GAILLARD: Today, you said you
14 contrasted measures and law because 1901(3) says
15 the law, and if you say laws, plural, I take it
16 that it's simply because on the one hand you have
17 the antidumping law, and on the other hand you have
18 the countervailing duty law. That's why you use
19 the plural; right? You don't mean to suggest laws
20 in the meaning of statute? That's correct?

21 MR. MITCHELL: Yes.

22 PRESIDENT GAILLARD: Thank you.

1 MR. MITCHELL: I want to go back to the
2 distinction between a law and a measure because
3 it's significant when one examines the arguments
4 that are advanced by the United States. Now, at
5 pages four to seven of its reply submission, reply
6 memorial, the United States places great stock on
7 two other Articles of NAFTA. They rely in
8 particular on Article 1607, and they rely on
9 Article 2103, and they rely on these as supporting
10 their interpretation of Article 1901(3).

11 With the greatest of respect to the United
12 States, those Articles support exactly the opposite
13 conclusion. So, if I could ask you to turn up
14 Article 1607, Article 1607 says this. Except for
15 this chapter and various other chapters, no
16 provision of this agreement shall impose any
17 obligation on a party regarding its immigration
18 measures.

19 Now, the parties by saying that clearly
20 demonstrated an appreciation that immigration
21 measures was broader in ambit than immigration law,
22 and they intentionally chose to use the broader

1 phrase. And yet, by contra distinction, they did
2 not do so in Article 1901(3).

3 By the same token, if you turn up Article
4 2103--

5 PRESIDENT GAILLARD: On taxis?

6 MR. MITCHELL: Yes. And I will have some
7 additional comments on this with respect to the
8 submissions on UPS. Article 2103 on taxation says
9 except as set out in this Article, nothing in this
10 agreement shall apply to taxation measures. Again,
11 far broader in demonstrating clearly that if the
12 parties had intended to cover something more than
13 the specifically defined term in Article 1902(1),
14 they knew how to do it. And they didn't. And it
15 would be wrong for this Tribunal to presume that
16 that was merely the function of sloppy drafting.

17 My third point in a textual interpretation
18 relates to--or in support of textual factors that
19 support the interpretation I urge upon you is this,
20 and it builds upon the point that I just described
21 relating to Articles 1607 and 2103, but the point
22 is that where the parties intended to exempt a

1 particular subject matter from dispute settlement,
2 the parties were able to do so, and they were able
3 to do so clearly. By contrast, the language used
4 in 1901(3) is anything but clear if it was intended
5 to exempt all matters in any way touching upon or
6 connected with an AD or CVD investigation or
7 determination. The submissions found at pages 48
8 to 52 of--or pages 48 to 52 of our reply memorial,
9 but there are several examples that I want to touch
10 upon, and I have included the text of them in the
11 memorial so that it's not necessary, hopefully, to
12 refer to the treaty.

13 But at paragraph 137 we set out Article
14 1101(1), and this is the typical formulation of
15 what is covered by and what is not covered by
16 provisions of the treaty. So, Article 1101(1) says
17 this chapter applies to measures adopted or
18 maintained by a party relating to investors of a
19 party, investments, et cetera, and then it clearly
20 defines what is beyond the scope of this chapter,
21 where it talks about in Article 1101(3), this
22 chapter does not apply to measures adopted or

1 maintained by a party to the extent that they are
2 covered by Chapter 14.

3 Now, in my submission, this is a very
4 clear example of how the drafters structured what
5 was included in the provision and what was
6 excluded.

7 Now, I need to pause because I believe it
8 was Mr. McNeill made a point of referencing Chapter
9 14 specifically and how the parties demonstrated
10 their intention to exclude certain matters. And
11 the reference on the transcript that I have is at
12 paragraph 109 starting at line nine, and
13 Mr. McNeill begins, (reading) For example, the
14 financial service chapter expressly incorporates
15 some of the substantive obligations in Chapter 11
16 as well as the investor-state mechanism of Chapter
17 11, Article 1401 provides the various provisions of
18 Chapter 11 provide--what they provide, and then he
19 says, Article 1401 demonstrates the very deliberate
20 means the NAFTA parties used to apply the
21 substantive obligations and the investor-state
22 dispute resolution mechanism to matters arising

1 under other chapters in the NAFTA.

2 This is an important point if you actually
3 look at what, how the Chapter 11 obligations that
4 are made available in connection with Chapter 14
5 are, in fact, imposed. What happens is they are
6 taken away, that is the first thing that happens is
7 Article 1101(3) says this chapter doesn't apply to
8 Chapter 14 matters unless they're put back in, and
9 then it's in Chapter 14 that you go and find
10 specific obligations relating to Chapter 11 are
11 added back. But they're added back after having
12 been removed from the scope of Chapter 11 by
13 Chapter 11 itself. There is no analogous provision
14 here, and in my submission Mr. McNeill's submission
15 cannot be sustained.

16 There is an additional point that
17 demonstrates how the parties intended to exclude
18 matters, and as other Tribunal members don't have
19 copies, I'm just going to reference so you know
20 where to look when you have the chance to
21 deliberate. But in Tab 19 of the authorities in
22 support of Canfor's rejoinder, there is a lawyer's

1 revision of the draft treaty, and it is the--it's
2 the lawyer's revision dated August 27th, 1992. And
3 the reason I want to identify this document as of
4 significance is because if you turn to or make a
5 notes of page 4870 and following, the parties
6 during the course of negotiations clearly were able
7 to identify specific provisions that they intended
8 to be placed outside of the scope of Chapter 11,
9 and so, for instance, page 4870 is headed
10 "Provisions to Be Placed Outside of the Investment
11 Chapter," and then there is a reference to national
12 security, to competition and state enterprises,
13 which we have already seen the exclusions put up on
14 the overheads relating to Article 1501 to
15 monopolies and state enterprises again which is
16 embodied in Article 1501, and to taxation, which is
17 embodied in Article 2103.

18 But what we do not see is any reference
19 whatsoever in the provisions to be placed outside
20 the scope of Chapter 11 to countervailing duty or
21 antidumping duty factual circumstances that might
22 otherwise violate the obligations under the treaty.

1 I have already averted to it, but clear
2 examples of how the parties intended to exempt
3 certain matters from dispute resolution can be
4 found again as we referred to Article 2103, which
5 provides 2103(1) "Except as set out in this
6 Article, nothing in this agreement shall apply to
7 taxation measures."

8 Note 43 is interesting because note 43
9 which relates to competition law relates to Article
10 1501, and it provides that specifically no investor
11 may have recourse to investor-state arbitration
12 under the investment chapter for any matter arising
13 under this Article. Again, there is no analogous
14 provision for matters that have some connection to
15 antidumping or countervailing duty matters.

16 With respect to national security, which I
17 flagged for you was one of the matters to be
18 specifically placed outside of Chapter 11, it is
19 explicit. It says the dispute-settlement
20 provisions of this section and of Chapter 20 shall
21 not apply to the matters referred to in Annex
22 1138(2), and then Article 1501(3), no party may

1 have recourse to dispute resolution under this
2 agreement for any matter arising under this
3 Article.

4 So, all of those are clear and precise and
5 explicit examples where the parties indicated an
6 intention to exclude matters from the coverage of
7 the NAFTA.

8 Article 1901(3) is, in my submission, very
9 different. It is specifically tied to a party's
10 antidumping and CVD's laws rather than any sort of
11 conduct. And had the parties intended to exclude
12 conduct which otherwise would violate the
13 obligations under Article 1105 or 1102 simply
14 because they have a connection to antidumping or
15 CVD matters, they should have done so more clearly.

16 Now, Mr. Landry made some comments on
17 Article 1904(15) and Article 1902. I will not
18 repeat them, but I do want to elaborate upon them.

19 Our premise is that the obligation being
20 imposed upon a countervailing duty law or an
21 antidumping duty law is an obligation to do
22 something to that law or an obligation not to do

1 something to that law. But the introductory words
2 of Article 1901(3) can't be ignored, and they say
3 no provision of any other chapter shall do what the
4 rest of the provision provides.

5 The necessary implication if other
6 provisions--provision of other chapters cannot do
7 something is that provisions of Chapter 19 do do
8 something with respect to the parties' antidumping
9 duty law, countervailing duty law, as those terms
10 are specifically defined in Article 1901 or
11 1902(1).

12 And so, the task is to look at the
13 provisions that are contained within Chapter 19 and
14 examine what obligations are imposed with respect
15 to the antidumping duty law and the CVD law as
16 those terms are defined.

17 Article 1902 deals with one such
18 obligation. It is the obligation to, if you amend
19 your law, to do so in a certain process compliant
20 with your WTO obligations following consultations.
21 That is an obligation with respect to the law. It
22 operates directly upon the law. If you want to

1 amend the law, you must go through that process.

2 And so, those are obligations imposed upon the law.

3 But the better example, in my submission,

4 and even more explicit is Article 1904(15). And

5 Article 1904(15) is explicit, and it says, "In

6 order to achieve the objectives of this Article,

7 the parties shall amend their antidumping and

8 countervailing duty statutes and regulations with

9 respect to antidumping and countervailing duty

10 proceedings involving the goods of the other

11 proceedings and other statutes and regulations to

12 the extent that they apply to the operation of the

13 antidumping and countervailing duty laws. In

14 particular, and without limiting the generality of

15 the foregoing, each party shall," and then some

16 specific obligations are imposed.

17 And these obligations are imposed on the

18 party, Canada, the United States, or Mexico, with

19 respect to the law, an obligation to do something

20 specific.

21 And, indeed, with respect to Mexico, with

22 respect to Mexico when we were dealing with the

1 adoption of the NAFTA, the obligations of the--of
2 Mexico to amend its countervailing duties, statutes
3 and antidumping duty statutes and regulations and
4 other statutes and regulations, is extensive. And
5 it's set out in Annex 1904(15), and it provides
6 basically 21 substantive amendments or changes,
7 fundamentally different changes, that must be made
8 to Mexico's CVD and AD law to ensure for instance
9 transparency, to ensure due process, to ensure the
10 right of an appeal, to ensure the right of a
11 written decision, to ensure many other substantive
12 matters, such as notice, access to information,
13 obligations with respect to service, right to
14 individual review.

15 The provisions are extensive, and they all
16 operate upon a party with respect to doing
17 something to their law. And in my submission those
18 are--provide a clear indication of what the parties
19 were thinking when they talked about imposing
20 obligations with respect to the law, and they
21 support the investors' contention.

22 There are some other textual indicators

1 that we submit support our interpretation, and
2 they're covered in detail in our memorial. I'm
3 only going to briefly highlight them to identify
4 some other points the Tribunal should bear in mind.

5 First, we have seen this contradistinction
6 between Article 1607 which is the closest in
7 parallel language that the United States has relied
8 upon to what's in 1901(3), but again I have already
9 made the point that that deals with measures and
10 not law.

11 And the other difference between
12 Article 1607, which is prescriptive and provides
13 that no provision of any other part of the treaty
14 shall impose obligations. In 1901(3), the
15 reference is no provision shall be construed as
16 imposing obligations. So, there is this difference
17 in structure by not only the fact that one
18 provision uses the word law and the other measures,
19 but also by the addition of the phrase "shall be
20 construed as." And in my submission, that's
21 indicative of the fact that Article 1901(3) is
22 intended to provide decision makers with an

1 interpretive guideline, that they should not
2 interpret provisions of any other provision of
3 NAFTA so as to impose an obligation to do something
4 to a party's antidumping law or CVD law.

5 Second, and there was some discussion this
6 morning relating to the use of the words "with
7 respect to"--

8 PRESIDENT GAILLARD: You say, Mr. Landry,
9 that this is an interpretation of something which
10 preexists in any event, or is also, I should say,
11 is also stated in 1902?

12 MR. MITCHELL: I'm not sure that I have
13 your question, Mr. President.

14 PRESIDENT GAILLARD: Could you say it's an
15 interpretive guideline?

16 MR. MITCHELL: It's an interpretive
17 guideline.

18 PRESIDENT GAILLARD: If it's only an
19 interpretation, does it mean that the rule exists
20 somewhere else? You have the rule, the principle,
21 and then you have the interpretation. Is that your
22 submission that the rule is expressed somewhere

1 else, and this is just an interpretation, or do you
2 see some independent rule in 1901(3) which you do
3 not find anywhere else other than the
4 interpretation?

5 MR. MITCHELL: What I say under 1901(3),
6 the parties were at pains to distinguish between
7 imposing an obligation and interpreting something
8 as imposing an obligation, and there must have been
9 a reason for that. I don't say that the obligation
10 is found outside the obligation with respect to a
11 party's AD or CVD law as those terms are defined in
12 Chapter 19, is found outside of--is found in
13 another provision.

14 What I say is that the Tribunal should not
15 interpret a provision that clearly seems to be
16 focused only on giving interpretive guidance as the
17 United States would have you have it, depriving the
18 Tribunal of jurisdiction with respect to a matter
19 simply because it touches a sphere, the provision
20 was not intended to be that broad.

21 PRESIDENT GAILLARD: Yes, but I'm focusing
22 on your interpretation in order to understand your

1 rebuttal, if you will, of the argument which has to
2 do with duplication because they say, well, if
3 you're right, it doesn't add anything to 1902.

4 So, you are saying, well, yes, it does add
5 something. It is a rule to avoid a wrong
6 interpretation of 1902 and the other chapters which
7 may lead someone to think that in other chapters
8 you have other duties with respect to the laws;
9 i.e., you also need to change this and that because
10 you want to be consistent with another chapter; is
11 that correct?

12 MR. MITCHELL: Or that some party could
13 say that by virtue of a provision of another
14 chapter, a state was obligated to do something with
15 respect--

16 PRESIDENT GAILLARD: In your intention to
17 change the law with respect to antidumping and
18 countervailing duties also. The changes--someone
19 would say that you have to change everything which
20 is to be changed pursuant to Chapter 19, but also
21 implicitly something which has to be changed
22 because of another general principle found

1 elsewhere, and therefore you also have to change
2 this and that, and you're saying this is a rule
3 which says clearly, no, the member states and the
4 parties to NAFTA have to change whatever is agreed
5 upon in Chapter 19, but nothing else, and you make
6 it crystal clear by using the language of 1901(3).

7 MR. MITCHELL: Yes.

8 PRESIDENT GAILLARD: That's all there is?

9 MR. MITCHELL: Yes.

10 PRESIDENT GAILLARD: In your contention,
11 and that's all there is in 1901(3), paragraph
12 three.

13 MR. MITCHELL: Yes.

14 PRESIDENT GAILLARD: That's a correct
15 understanding of your contention, of your
16 understanding of 1901(3)?

17 MR. MITCHELL: Yes.

18 PRESIDENT GAILLARD: Thank you.

19 MR. MITCHELL: Starting to make some
20 observations on the United States's reliance on the
21 words "with respect to." And I want to focus my
22 submission, and again this has been canvassed in

1 the memorials, but the phraseology used in
2 Article 1607 and Article 2103 is regarding,
3 regarding its immigration measures, and applied to
4 taxation pleasures. Again, have you my point on
5 measures as opposed to law, but I also say that the
6 words "apply to" and "regarding," when used in
7 their ordinary course, are broader than "with
8 respect to."

9 And in my submission, "with respect to,"
10 and you can't parse the phrase and define "with
11 respect to" in one particular provision of the
12 treaty and say that meaning shall have--be applied
13 throughout all others because the significance of
14 the phrase "with respect to" is that it is
15 relational. It describes the matter upon which
16 that which precedes it operates. So, it is a
17 relational matter here; the obligation must be with
18 respect to, and I say that means directly operating
19 upon the defined matter CVD or antidumping law.
20 Our submission is at paragraphs 30 to 34 of our
21 rejoinder, but again, my general proposition is
22 that the terms used in the other provisions,

1 "apply" or "regarding" are broader in their
2 ordinary use than the phrase "with respect to."

3 I have already touched on this to some
4 extent, but I'm going to elaborate upon it because
5 Ms. Menaker made some submissions about a law and
6 the application of the law, and I understand the
7 tenor of the submission to be that the application
8 of a law is subsumed within the law, and therefore
9 a matter with respect to the law also includes a
10 matter with respect to or anything touching the
11 application of the law.

12 In my submission first, the language of
13 Article 1902 clearly refers to the normative rules.
14 That is the antidumping duty law or countervailing
15 duty law relate to the rules to be applied. And I
16 made this point as well, that the text itself in
17 Article 1904 distinguishes between laws and the
18 application of them. It's explicit, indeed, it's
19 explicit in Article 1901 or 1902(1) as well.

20 But, Ms. Menaker made some submissions
21 with respect to the UPS decision, and the
22 submission, as I understand it, and I'm not sure

1 that I do, is that somehow the UPS Tribunal
2 decision with respect to antidumping--with respect
3 to Article 2103 somehow assists the United States
4 here. Our submission is at paragraph 41 of the
5 rejoinder, but the point is really simply twofold.
6 First, the provision that was going to be an issue
7 in the UPS case dealt with taxation measures. It
8 did not deal with the circumstance that we are
9 dealing with, a law, and of course a measure can
10 encompass the application of a rule or the
11 application of a law, and therefore fundamentally
12 the circumstances are entirely different.

13 More significantly, though, the point was
14 never argued. It was simply abandoned by counsel,
15 and the Tribunal in passing made reference to the
16 fact that the position that had been agreed to
17 between a UPS and Canada about how the argument
18 would proceed seemed to them to comport with the
19 treaty. There was no argument. There was no
20 debate. There was no discussion, and so it places
21 in my submission far too much freight to bear upon
22 that award for it to make any difference in this

1 Tribunal's decision.

2 I want to turn to the context, and why we
3 say that the context and the circumstances
4 surrounding the succession of the treaty do not
5 support the United States's interpretation, but
6 rather the reality is they support the contrary.

7 This originally was raised in the United
8 States's original objection where in footnotes 109
9 and 110 the United States cited various quotes from
10 various individuals which purport to explain the
11 reasons behind Chapter 19. When looked at
12 carefully, the quotes seem nothing more than that
13 the parties had attempted to come to agreement on
14 new approaches to unfair trade practices in
15 relation to cross-border trade and goods. They
16 confer nothing more than that the parties were
17 looking at a very technical subject in an attempt
18 to come to a new approach. There was no suggestion
19 whatsoever that in discussing those matters they
20 were at all concerned with the issues of customary
21 international law as it relates to foreign
22 investors or the obligations that were being

1 imposed by Chapter 11.

2 Now, there are two specific points that I
3 want to make. Throughout the day, we have heard
4 the United States rely, and they've done so in
5 their memorials on the statement of administrative
6 action which they say demonstrates the United
7 States's contemporaneous understanding of what was
8 occurring when the treaty was enacted or was
9 concluded.

10 And the United States said in its
11 statement of administrative action with respect to
12 Chapter 19 the following: Articles 1901 and 1902,
13 and just for your reference for the transcript can
14 be found at Tab 27 of the authorities of the
15 claimant on the rejoinder at page stamped 643 at
16 the top, it says Articles 1901 and 1902 make clear
17 that each country retains its domestic antidumping
18 and countervailing duty laws and can amend them.
19 Article 1903 provides that the NAFTA country can
20 request a binational panel to review whether an
21 amendment to another country's antidumping or
22 countervailing duty statutes is consistent with

1 Chapter 19. Quote, These provisions are identical
2 to Articles 1901 through 1903 of the CFTA except
3 for technical changes necessary to accommodate the
4 addition of a third party.

5 So, this morning we heard from the United
6 States that it was for Canfor to somehow explain
7 what these technical changes were that--that
8 1901(3) facilitated the addition of a third party.

9 Well, with respect, it's my submission
10 that it is for the United States to explain the
11 stark discrepancy from the broad and encompassing
12 implications of the approach they now advocate, and
13 the approach that they advocated when they were
14 explaining the treaty to Congress.

15 PRESIDENT GAILLARD: If I may interrupt
16 here, this is a question we want to ask, it was in
17 our list of questions, so I may as well flag it.
18 That's more of a question for the U.S. to answer
19 the specific argument of the language and the views
20 in the aggregate of those two provisions as
21 described by Mr. Landry a moment ago.

22 MR. MITCHELL: Mr. Mitchell.

1 PRESIDENT GAILLARD: I'm sorry.

2 MR. MITCHELL: That's quite all right.

3 PRESIDENT GAILLARD: You switched the
4 seats.

5 MR. MITCHELL: I have been called worse.

6 We can't speculate on what those technical
7 changes were. I can hypothesize. I mean, I guess
8 maybe I am speculating rather than hypothesizing.
9 The--under Mexican law, as the United States has
10 pointed out, proceedings can occur directly for a
11 NAFTA violations under--in the domestic courts of
12 Mexico, the notion of direct effect of the treaty
13 exists in Mexico. It may be that it was that
14 notion that it was felt necessary to have a
15 provision such as this to ensure that a Mexican
16 court did not do something so as to impose an
17 obligation on Mexico with respect to its CVD or AD
18 law, but we don't of and we can't know. We are
19 faced solely with the statement from the United
20 States that this is simply a technical change in
21 design to facilitate the addition of a third party.
22 Second, what I can say is that after this

1 Tribunal made its order that additional documents
2 be produced relating to the negotiating history and
3 the negotiating text of the NAFTA, nowhere in any
4 of those documents, anywhere that the United States
5 has produced is there any suggestion of the
6 approach that they now advocate. Indeed, I have
7 referred you already to the documents which are
8 found at Tab 19 of the rejoinder of authorities
9 which was the lawyers' revision which does not
10 include matters that touch upon AD or CVD as
11 matters to be excluded from Chapter 11, although it
12 does make that--make such references, for instance,
13 for taxation, national security, competition, et
14 cetera.

15 So what are the implications of the U.S.
16 approach? And in this regard this is essentially a
17 question of examining the policy implications of
18 the approach they advocate or put a different way,
19 asking whether the approach of the United States
20 advances or hinders the attainment or achievement
21 of the objects and purposes of the treaty.

22 Mr. Landry has already spoken about

1 effective dispute resolution, and I don't need to
2 repeat it. We have included in Tab 1 of the
3 rejoinder materials the latest ITC or Chapter 19
4 decision relating to the ITC finding of threat of
5 injury, which is instructive reading when one wants
6 to consider whether the process of effective
7 dispute resolution is being advanced by what is
8 occurring.

9 And I want to emphasize the submission
10 again that the objects and purposes must be looked
11 at as a whole, and one cannot parse them and say
12 this object relates to effective dispute
13 resolution. That's what this case is about, and
14 this object relates to something else. These
15 objects relate to trade. These objects relate to
16 investment. A company like Canfor is an integrated
17 operation with substantial cross-border investments
18 and operations. It is both an investor and a party
19 that trades in goods. These are--the objects of
20 the treaty do not define themselves as these are
21 our trade objects and these are our investment
22 objects. They are all to be interpreted together.

1 We say that the United States's approach
2 would provide it with an immunity from liability to
3 an investor for acts which otherwise violate the
4 obligations under customary international law. We
5 know that Article 1105 embodies that standard, and
6 equally their customary international law
7 obligations of nondiscrimination. It is, in our
8 submission, once again placing too much weight upon
9 the language of Article 1901(3) to suggest that
10 that provision was in the absence of any
11 information to support it intended to excuse the
12 United States from responsibility to an investor
13 that would otherwise violate its customary
14 international law obligations.

15 Put slightly differently, Canfor complains
16 about arbitrary and discriminatory conduct. And
17 when we say arbitrary, we mean arbitrary in the
18 international sense, conduct that was described in
19 the ELSI case as being not of law but opposed to
20 law or opposed to the rule of law, and we say that
21 if we meet that standard that the conduct we
22 complain of and that we are able to demonstrate to

1 this Tribunal on the evidence is arbitrary in an
2 international way, and is therefore opposed to the
3 rule of law that that conduct cannot be with
4 respect to law.

5 Professor Weiler raised a question this
6 morning of the implications for Canadian investors
7 vis-a-vis investors if I've got the question right,
8 vis-a-vis investors from a BIT state with the
9 United States and vis-a-vis investors from a
10 non-BIT state with the United States, postulating a
11 hypothesis where a matter connected with the
12 antidumping or countervailing duty spheres and the
13 conduct of the United States officials violated the
14 customary international law obligations, and the
15 question, as I understood it, was what are the
16 implications of that vis-a-vis Canfor, and is it
17 correct that Canfor, a Canadian investor, would be
18 disadvantaged vis-a-vis an investor, say, from
19 Lithuania, Albania or Georgia or one of the states
20 that does not have a BIT with the United States.
21 It's our submission that that is exactly the
22 implication of the approach that the United States

1 contends, and it's our implication or it's our
2 submission that when you are dealing with parties
3 with a relationship as close and as friendly, and
4 as important as the relationship between Canada and
5 the United States, given the strength and the size
6 of the trading relationship simply, for instance,
7 that it would be extraordinary if the parties
8 intended in the absence of any evidence that that
9 was the intention to provide an Albanian investor
10 Georgia investor or investor from a third party
11 state with greater rights and greater protections
12 that would be afforded to a Canadian investor.

13 PRESIDENT GAILLARD: Mr. Mitchell, are you
14 using that as an argument with respect to the
15 interpretation which you put forward? Or are you
16 using that as a separate argument based solely on
17 the MFN provision?

18 MR. MITCHELL: No, this is an argument
19 that is independent of the MFN argument. This
20 argument is an interpretation argument in the sense
21 that what we are addressing is the consequences or
22 the implications of the United States's approach.

1 PRESIDENT GAILLARD: You're saying it
2 cannot have been the intent of the NAFTA parties to
3 do something which, in a sense, is going to mean
4 that close friends like the three parties to NAFTA
5 are going to be treated worse than any beneficiary
6 of any BIT in the world; right?

7 MR. MITCHELL: Right.

8 PRESIDENT GAILLARD: It's one thing to say
9 that, and I understand the argument--I'm not saying
10 it's right or wrong, but I understand the argument.
11 It's another thing to say, even if we are wrong in
12 the interpretation of the NAFTA provisions, since
13 any beneficiary of a BIT would be protected in your
14 view better, then since we have in NAFTA an MFN
15 provision, we can also access that protection
16 through the MFN provision. And if that is also
17 your contention, possibly in the alternative, then
18 have you to dealt with the issue of the
19 relationship between the MFN provision and the
20 jurisdictional requirements in the specific context
21 of NAFTA, which has specific language.

22 MR. MITCHELL: I think I can address your

1 question. We rely upon the MFN provision in the
2 event that the obligations, for instance, in the
3 Albanian treaty or the Lithuanian treaty provide a
4 greater degree of protection than is provided under
5 1102, 1105, 1110, so we rely upon MFN in that
6 respect.

7 PRESIDENT GAILLARD: If I may clarify just
8 to follow you step by step, this is on the merits
9 of the protection. The extent provided by Chapter
10 11 Section A.

11 MR. MITCHELL: Yes.

12 PRESIDENT GAILLARD: So you're saying this
13 is what it means, in addition, look through the
14 MFN. I can take the language of other treaties.
15 That, I understand perfectly.

16 MR. MITCHELL: Okay. As I understand the
17 United States's argument--

18 PRESIDENT GAILLARD: I'm not talking about
19 the argument of the United States at this stage.
20 I'm saying that's all I have seen in your memorial
21 so far regarding the MFN. Are you contending today
22 that through the MFN you would have, in case you

1 lose on your jurisdictional arguments, a broader
2 jurisdiction which you would get through the MFN?
3 I do not understand the written pleadings to be to
4 that effect, but can you confirm that for the
5 record, please.

6 MR. MITCHELL: I have to do that in
7 connection with our understanding of the United
8 States's interpretation because what I understand
9 and may want to reflect on this overnight is that
10 the United States contends that if their
11 interpretation is correct, then there is no MFN
12 because the entirety of the Section A and Section B
13 obligations fall away.

14 PRESIDENT GAILLARD: Right, because their
15 argument is, as presented, of a jurisdictional
16 nature.

17 MR. MITCHELL: And so they say that those
18 obligations that consent to Section A and Section B
19 arbitration would disappear, and therefore we could
20 not rely upon the MFN provision.

21 PRESIDENT GAILLARD: That's right. As the
22 argument I want to know your views on the argument.

1 MR. MITCHELL: As an aide to your
2 interpretation of 1901(3), I say that that can't
3 have been the intention because the consequence
4 would be what Professor Weiler was asking about
5 earlier; namely, that these other parties, these
6 other states, would have greater protections in
7 this sphere, and Canada would not be--a Canadian
8 investor would not be able to attract the MFN
9 protections, and that strikes me as an
10 extraordinary proposition.

11 PRESIDENT GAILLARD: So, you're using that
12 comment in the context of the interpretation of
13 1901(3) and not as a stand-alone basis for
14 jurisdiction?

15 MR. MITCHELL: Yes.

16 PRESIDENT GAILLARD: Thank you.

17 MR. MITCHELL: I'm not going to revisit
18 the submissions with respect to Articles 1115 and
19 Article 2004. We have the Tribunal's point that
20 those are matters that we will be talking about
21 tomorrow.

22 But at the end of the day, Canfor's claim

1 is that as an investor having invested hundreds of
2 millions of dollars in the United States,
3 developing its integrated softwood lumber
4 operations, if, in its investment had been
5 seriously harmed by the extraordinary conduct of
6 the United States, the stakes to Canfor are
7 immense, as you've heard, without accounting for
8 the other harm that has been suffered, the harm
9 from loss of opportunity to develop investments,
10 the harm from changes to its operations, the harm
11 from price pressures, all of the various harms that
12 Canfor has suffered in addition it has paid over
13 half a billion dollars in duties.

14 Canfor submits that it's entitled to the
15 opportunity to show this Tribunal that the United
16 States has not lived up to the international
17 standards which bind it under customary
18 international law, and that it's entitled to put
19 before this Tribunal the array of circumstances,
20 the array of facts, and the evidence which show
21 that the United States has not met that standard.

22 Canfor says that the interpretation that

1 the United States would have you adopt, providing a
2 safe harbor for conduct no matter how egregious
3 providing it has a connection to the CD or CVD
4 spheres is not sustainable.

5 In summary, I say you ought not to give
6 effect to an interpretation which has such a severe
7 implication with no evidence produced in support,
8 that, in our submission, goes against the plain
9 meaning of the words used--here in particular again
10 I refer to the fact the 1901(3) uses the
11 specifically defined phrase and does not use the
12 phrase measure. That is an unusual formulation at
13 best for a provision supposedly intended to exclude
14 the operation of Chapter 11, and here I rely on the
15 different formulations in note 43, Article 1501,
16 Article 1101 and 8, Article 2103 and 1138 as well
17 as the interpretive guideline construed and with
18 respect to.

19 An interpretation that advances no policy
20 or purpose or object of the treaty, but indeed goes
21 against them by denying Canfor a right to advance
22 its claim. That does nothing to promote conditions

1 of fair competition. It does nothing to promote
2 the liberalization of trade. It does nothing to
3 promote investment and does nothing to provide a
4 fair, predictable, and efficient dispute resolution
5 mechanism.

6 As well, it's unsupported by and is indeed
7 directly contrary to the contemporaneous record
8 that we have talked about. In light of the
9 significant implications of the United States
10 interpretation, one would have expected some record
11 to exist rather than the characterization of mere
12 technical changes.

13 Lastly, Canfor says that it is important
14 to bear in mind that this is an extraordinary case.
15 It is highly unlikely that the U.S. will violate
16 its international obligations under Chapter 11
17 simply because it applies its CVD and municipal,
18 CVD and antidumping municipal laws when it does so
19 in good faith and in a manner consistent with its
20 WTO obligations, but that is not this case. Every
21 dumping or CVD case is not going to lead to a
22 Chapter 11 proceeding, but where the conduct of the

1 United States officials gives rise to a consistent
2 pattern of arbitrary, discriminatory treatment of
3 foreign investors, and where its conduct flagrantly
4 disregards the rule of law and undermines the
5 Chapter 19 dispute resolution process, then Canfor
6 is entitled to an opportunity to vindicate its
7 rights before this Tribunal.

8 For all of these reasons, it's my
9 submission on behalf of Canfor that the United
10 States's objection to this Tribunal's jurisdiction
11 must be dismissed.

12 PRESIDENT GAILLARD: Thank you,
13 Mr. Mitchell.

14 Do my co-arbitrators have questions? Yes,
15 Conrad. You want to start.

16 ARBITRATOR HARPER: Thank you, Mr.
17 President.

18 Mr. Mitchell, I want to make sure I have
19 it clear in my mind, that the Tribunal has clear in
20 its mind, exactly what the position is of Canfor,
21 so let me put a series of questions.

22 Does a body of administrative decisions,

1 in Canfor's view, constitute administrative
2 practice?

3 MR. MITCHELL: I will defer to Professor
4 Howse.

5 PROFESSOR HOWSE: That, as I think both
6 Mr. Mitchell and Mr. Landry have put it, would
7 depend upon whether those decisions have normative
8 weight of a precedential nature. So, it really
9 just depends upon that factor. If the fact is that
10 the meaning of law that we are dealing with here
11 looks at those normative materials to be applied in
12 deciding an individual case, rather than the
13 application of an individual case, and
14 administrative decisions could be part of the
15 normative material, depending upon their force as
16 precedent in that particular municipal law system.

17 ARBITRATOR HARPER: Do the preliminary and
18 final determinations of the Department of Commerce
19 and the ITC with respect to antidumping and
20 countervailing duty law constitute a body of
21 administrative practice?

22 MR. MITCHELL: No.

1 ARBITRATOR HARPER: Are judicial
2 decisions, judicial precedents--

3 MR. MITCHELL: Well, I think the question
4 could be answered quite so simply. I will use this
5 hypothetical: In the municipal regime in Canada
6 and the United States, if I am a party to a
7 particular proceeding, and I take it that
8 proceeding, A versus B, to an appellate level, the
9 decision of the court of first instance is not a
10 precedent. It is the very application of rules to
11 a set of facts as found that is the subject of the
12 debate.

13 The judicial decisions can form the body
14 in a common law system of precedent, and when one
15 thinks of that, again in the common law system in
16 Canada and the United States--and this, of course,
17 would differ from the civil law--

18 PRESIDENT GAILLARD: It may well be the
19 same in the civil system.

20 MR. MITCHELL: --we would look at the
21 judicial precedent, and what we would mean by that
22 is the specific--and again, the common law system

1 the ratio decedendi, the specific rule gives
2 guidance, but the entirety of the case is not a
3 precedent in that sense. I don't know if that's
4 clear enough. I may want to elaborate upon that.

5 PROFESSOR HOWSE: May I just give an
6 example. Let's say that at the time the NAFTA came
7 into force it turned out that the U.S. agency in
8 question was using a particular past determination
9 as a rule or guideline for deciding future cases.
10 Certainly, in that instance, it would--what these
11 various provisions of Article 19 say is that there
12 is no obligation imposed upon the United States and
13 its authorities to stop using that determination as
14 a precedent. If it has been using such
15 determinations as precedents or drawing rules from
16 them to decide future cases, it is not obliged to
17 stop doing that. Just as it is not obliged to
18 change its statutes, it is not obliged to change or
19 refrain from using other normative materials even
20 if they're embodied in past rulings. But the
21 essential issue is whether the administrative
22 practice or whatever is being used as normative

1 material to decide cases. And what the provisions
2 in question say is you could continue to use it,
3 subject to the specific conditions imposed by
4 Chapter 19.

5 ARBITRATOR HARPER: Let me draw your
6 attention to two provisions that I know you know
7 well, Mr. Mitchell. Now, the first is Article 201,
8 that portion of it that states, "measure includes
9 any law, regulation, procedure, requirement, or
10 practice," and the other provision--again very
11 famous in these proceedings--Article 1902(1),
12 second sentence, "antidumping law and
13 countervailing duty law include as appropriate for
14 each party relevant statutes, legislative history,
15 regulations, administrative practice, and judicial
16 precedents."

17 Is Canfor asking this Tribunal not to read
18 those provisions literally?

19 PRESIDENT GAILLARD: That may be difficult
20 to answer as such. I mean, can you elaborate,
21 Conrad, of the question?

22 ARBITRATOR HARPER: Yes. The question

1 grows out of an argument which seems to suggest
2 that we should read, for example, the word
3 "administrative practice" as something different
4 from the decisions that administrative agencies
5 yield. I take it that was part of the thrust of
6 what Professor Howse was saying, and there are many
7 other examples of that in your presentation. I'm
8 simply probing, if I may, to find out whether
9 Canfor's position is that none of these words is to
10 be understood as literally written on the page, but
11 rather to be interpreted in light of all the
12 circumstances you say are relevant. In other
13 words, should we read those words as they are, or
14 must we understand them by virtue of some
15 elaboration of interpretation?

16 MR. MITCHELL: I'm going to just make some
17 initial observations and then provide it to
18 Professor Howse and reserve the right to come back
19 to it.

20 The starting point in any circumstance is
21 that you don't read the words literally. You read
22 them in accordance with the requirements set out

1 specifically in 102(2) in light of the objectives
2 set out in paragraph one and in accordance with the
3 applicable rules of international law that
4 Mr. Landry referred to, which are the ordinary
5 meaning of the words in their context.

6 Now, the context of the definition of law,
7 countervailing duty and antidumping duty law that
8 you refer to in 1902(2), includes the nature of the
9 matters surrounding it. They are with--and I think
10 the area that you're struggling with or focusing
11 upon is the phrase "administrative practice," but
12 all of the words around that phrase demonstrate an
13 intention that what is being contemplated here is
14 the rules to be applied; whereas when one looks at
15 definition of measure, it is a clearly far broader
16 and as the context here we were able to demonstrate
17 the United States's insistence in negotiating
18 Chapter 11 that measure can include a single act.

19 So, the words take meaning from their
20 immediate context and their context within the
21 Treaty as a whole. But I would challenge the
22 proposition that a decision from an administrative

1 decision maker--and here what we are talking about
2 particularly because we are in the CDV regime, a
3 decision, a determination that they make is
4 administrative practice, because when the drafters
5 intended to refer to the determinations, they used
6 the word "determination." And "administrative
7 practice," in my submission, takes the meaning that
8 Professor Howse has articulated, and I will turn it
9 over to Professor Howse to elaborate.

10 PRESIDENT GAILLARD: I think we
11 understand, I mean, but please, if you have a short
12 answer on this.

13 PROFESSOR HOWSE: No, I think that clearly
14 you understand that our response just flows out of
15 our interpretation of the Vienna Convention Article
16 31, which has already been presented by Mr. Landry
17 and Mr. Mitchell to the panel, that the ordinary
18 meaning does not entail a literal interpretation,
19 and then you go to context to confirm or alter a
20 literal interpretation that ordinary meaning means
21 ordinary meaning in context. There is no such
22 thing as context lists ordinary meaning.

1 PRESIDENT GAILLARD: This is for full
2 consideration by both parties. I don't understand
3 this debate myself. I understand the distinction
4 between a body of rules which may include
5 administrative practice or precedents, and
6 individual determination that a particular party is
7 subject to a particular rule. If that's the
8 difference between legal theory, the rule in the
9 decision in the purest meaning, we understand that.
10 So, I guess the debates runs around that. When a
11 party says what law means is whatever source of the
12 law is, it's the body of rules as opposed to the
13 decisions, and there is some debate on your side as
14 to using the language, but I think we are perfectly
15 clear on this.

16 And that's a comment which I make for
17 further elaboration on the U.S. side, if they feel
18 feel that it's appropriate or relevant.

19 ARBITRATOR HARPER: Mr. Mitchell, with
20 respect to Canfor's claims under Chapter 11, is the
21 only international law that you claim the United
22 States has violated customary international law?

1 MR. MITCHELL: No, because we have alleged
2 a violation of Article 1105 which the United States
3 will embody solely the customary international law
4 obligations. We have alleged the violation of
5 Article 1110, the expropriation provision, the MFN
6 provision, which is not a customary international
7 law obligation additionally to our arguments under
8 Article 1102 which the United States says are not
9 customary international law obligations. And while
10 there may be some debate upon that, our claim is
11 tied to those provisions and the obligations that
12 are embodied within them. So, that's my initial
13 response, but I would like to take note of the
14 question and reflect upon it further.

15 ARBITRATOR HARPER: Well, just in that
16 connection, if you would also consider specifically
17 whether it's Canfor's position that 1102 and 1103
18 are statements of customary international law or
19 not.

20 MR. MITCHELL: We will give you our
21 response tomorrow.

22 PRESIDENT GAILLARD: Conrad, are you done

1 with your questions?

2 ARBITRATOR HARPER: Yes.

3 PRESIDENT GAILLARD: Joseph, do you want
4 to ask your questions, in the same spirit of
5 answering now if it's a short answer or more likely
6 we will have more time tomorrow. And also in each
7 of those questions I want to have both sides'
8 determinations.

9 ARBITRATOR WEILER: This is the part that
10 I find--I really believe I understand your
11 argument. This is the part that I find most
12 difficult with it. If I go back to 1901(3), and
13 let's say I pursue your conceptual framework, and
14 let's say you are right, and in the case such as
15 this, a panel such as ours would go to evaluate the
16 claim based on Chapter 11, and let's say it found
17 for the claimant, and let's say it indicated
18 damages, wouldn't the indication of damages mean
19 that in some way the law on which those--the
20 determination pursuant to the laws which gave the
21 rise to a wrong for which the panel says damages
22 have to be paid, doesn't that mean that there is

1 some kind of obligation for the NAFTA party to
2 change the law, if that law--if the proper
3 application of that law can cause an injury which
4 gives rise to damages?

5 I mean, just to pursue my thought, could
6 it be the case that a Chapter 11 Panel said damages
7 flow on the basis of a correct application of your
8 law and there is nothing wrong with that law?
9 Isn't there some kind of an obligation? Isn't
10 there at least in some circumstances--let me even
11 further elaborate.

12 You said that in some cases there could be
13 a wrongful application of the domestic law, could
14 be unlawful and that could cause international
15 arbitrariness, and therefore damages would flow and
16 that would not be problematic, because the
17 implication would be just get your own law right
18 and you won't fall afoul of your international
19 obligation.

20 But I think your position is also that
21 there could be a correct application of domestic
22 law. There are millions of instances of injuries

1 to aliens where national law is not violated, and
2 yet there would be a violation of Chapter 11 for
3 which damages would be awarded, but doesn't that
4 necessarily implicate that the law, the correct
5 application of which made a determination which
6 caused some damages in some sense is contrary to
7 the NAFTA and therefore has to be change, and
8 wouldn't that mean that there is an obligation in
9 relation to that law?

10 MR. MITCHELL: I'm going to take the
11 question under advisement, but refer the initial
12 response to Professor Howse.

13 PROFESSOR HOWSE: This is just an initial
14 response. Canfor's position is not that 1901(3)
15 could have no effect on the ruling--on a ruling on
16 the merits, so on the hypothetical that you give,
17 if it turns out that the failure to meet the
18 standards in Chapter 11 stems directly and of
19 necessity from the law itself, it may be that
20 1901(3) would function in such a way that that part
21 of the relief that flows from violating the
22 Standards of Conduct that comes from the law itself

1 purely and simply might not be available. But it
2 would be our submission that that's really a matter
3 for the merits, and it goes back to our submission
4 that 1901(3) is not jurisdictional in the sense
5 that it's not a carve-out of jurisdiction. It may
6 have some meaning in terms of the way in which this
7 Tribunal approaches the merits of particular claims
8 of Canfor and how it views its approach to relief
9 under particular claims.

10 But, until we thoroughly understand the
11 sources of the violations of the standard of
12 treatment under Chapter 11, and to what extent they
13 might come inexorably from the status of the law
14 itself, we wouldn't be able to resolve that
15 question. And Canfor's contention is, of course,
16 that our view of these violations is that they stem
17 from conduct that is not mandated, or we cannot see
18 as mandated by U.S. law, but that, in fairness,
19 would be subject to argumentation and analysis.

20 PRESIDENT GAILLARD: All right. So, we
21 have no further questions at this stage, so you
22 have the floor, Mr. Mitchell. Are you done with

1 your presentation?

2 MR. MITCHELL: Those are the submissions
3 on behalf of Canfor.

4 PRESIDENT GAILLARD: I understand this
5 concludes the presentations of both parties for
6 today.

7 We are scheduled to meet tomorrow at nine.
8 Is that still on? Mr. Clodfelter, you have a
9 comment? Ms. Menaker.

10 MS. MENAKER: Thank you. I spoke with
11 counsel for Canfor at the break, and we were
12 thinking that, well, first because we have gone a
13 little later than we had originally anticipated
14 today and because it seems more likely than not
15 that we will, indeed, take most, if not all, of the
16 day tomorrow, where we had first envisioned perhaps
17 finishing our arguments in the morning, we were
18 thinking that it might be helpful for both of
19 parties since we do have a lot to ponder this
20 evening if we started tomorrow morning perhaps a
21 little later than 9:00?

22 PRESIDENT GAILLARD: What do you have in

1 mind?

2 MS. MENAKER: Would 9:30, if that would be
3 amenable?

4 PRESIDENT GAILLARD: We're in your hands.
5 If it's agreed by the parties, 9:30 is fine.

6 I'm a little worried by what you just
7 said, Ms. Menaker, that you would take the whole
8 day just for the reply and surreply? Or does that
9 include questions?

10 MS. MENAKER: Yes, Mr. President, I did
11 not want to--I apologize if I worried you.

12 PRESIDENT GAILLARD: I'm not worried.
13 It's simply at odds with what you had agreed
14 initially, so I want to make clear what we are
15 talking about.

16 MS. MENAKER: No, that is correct. The
17 only reason that our anticipation has changed is
18 because the Tribunal did indicate this morning that
19 it expected to have a number of questions for us
20 tomorrow afternoon. So, we don't--

21 PRESIDENT GAILLARD: So, the
22 current--well, it's your turn to speak, so let's

1 address this in turn. On the side of the United
2 States, you think that initially you had a two-hour
3 presentation in mind, so you stick to that.

4 MS. MENAKER: That's correct.

5 PRESIDENT GAILLARD: So, you have
6 something in mind like an hour and a half, two
7 hours?

8 MS. MENAKER: Yes.

9 PRESIDENT GAILLARD: You can assume we
10 have read very carefully everything. That goes to
11 both sides, as we have read very carefully
12 everything, we think we understand what you're
13 saying. If we do not, or if we have queries about
14 the meaning of an argument or anything, don't
15 worry, we will ask you. So, you will have an
16 opportunity to elaborate on whatever we think is
17 unclear in our minds, in addition to answering the
18 other side. So, you can rest assured that we know
19 all of your arguments as they stand in the
20 pleadings so far.

21 So, if you can use an hour and a half or
22 something like that, I think it's in order. You

1 can have your two hours, but I think if I were in
2 your shoes, the most important thing is to get not
3 our reactions but certainly more questions because
4 you want to spend most of your time with your
5 argument where we think there is a problem or a
6 question or something which is unclear, but
7 certainly we have another two days, so we certainly
8 have plenty of time to do both. But I think an
9 hour and a half, for instance, would be good, but
10 you do it as you wish.

11 So, if the U.S. side uses, say, an hour
12 and a half, two hours, or whatever you think is
13 appropriate, then on claimant's side, what do you
14 have in mind? Another same time frame? Or do you
15 want a break? If we start at 9:30, that would mean
16 that we would have the U.S. reply, and we would be
17 done at, say, 11:30. Do you want to break? Or how
18 do you see the rest of the day?

19 MR. LANDRY: Mr. President.

20 PRESIDENT GAILLARD: Mr. Landry.

21 MR. LANDRY: Just so we understand what is
22 being discussed here, we had discussions with the

1 United States on this very point for the time frame
2 that was put forward, and the thing that we were
3 anxious to have the United States agree--and they
4 did agree--was that our entire arguments, both
5 sides' entire arguments, would be presented in the
6 first day--in effect, the presentations that you
7 have heard today--and that reply and surreply would
8 be limited simply to replying to the other side's
9 points. Having said that, we both acknowledged the
10 fact and hoped that there would be questions from
11 the Tribunal that both parties would have to
12 respond to.

13 So, in that respect, from our perspective,
14 we don't envisage a lengthy, in the way it's used
15 there, surreply, but obviously there are numerous
16 questions here that have to be dealt with already,
17 and I'm assuming, Mr. President, that there will be
18 others that you would like us to respond to, and we
19 will respond to that. That's the first point I
20 wanted to make.

21 I had a second point, if I could,
22 Mr. President, that when we spoke with the United

1 States and came to the conclusions that we did in
2 terms of timing, obviously, as can you see the
3 timing, we thought it would get us through midday
4 tomorrow approximately. Unfortunately--and I told
5 Ms. Menaker this--that Mr. or Professor Howse has a
6 commitment tomorrow afternoon. There are a number
7 of questions which I think we would like to have
8 Mr. Howse or Professor Howse's input. He is
9 available, obviously, all day Thursday, and I spoke
10 to Ms. Menaker about the possibility that if there
11 were a few questions that we did want Professor
12 Howse to deal with and couldn't deal with in the
13 morning that we could deal with it on Thursday
14 morning. So, I raised it as nothing more than a
15 timing issue that we have.

16 PRESIDENT GAILLARD: From when to when
17 would you be unavailable, Mr. Howse?

18 PROFESSOR HOWSE: Mr. President, I would
19 be unavailable for the afternoon session tomorrow
20 only.

21 PRESIDENT GAILLARD: For the whole
22 afternoon?

1 PROFESSOR HOWSE: Yes. The unfortunate
2 fact is that I have an obligation that I cannot
3 otherwise--I cannot escape from, and I apologize
4 for that. As Mr. Landry said, our discussions on
5 the time frame were a little different than what's
6 now emerged, and I don't want to go into detail
7 about the personal circumstances, but suffice it to
8 say that these are--

9 PRESIDENT GAILLARD: No, no, it's
10 perfectly fine. We are not asking any details. We
11 are trying to organize the three days in an
12 efficient way. Simply, what we had in mind is that
13 we would today--so, we would have a Q-and-A session
14 which would be quite active on our side, and what
15 we don't want to do is ask questions and then take
16 notes and you have 15 questions, and then you speak
17 for an hour and a half about these 15 questions.
18 We don't find that terribly useful for us. It's
19 useful to do it once, like you have done
20 today--it's useful, and I thank both sides for
21 doing this--but afterwards it should be more
22 active, and frankly we should ask questions. What

1 we had in mind is something more like we have
2 certain questions. We start with, say, a small
3 question for the U.S., and we have the answer, and
4 then we ask for your comments, possibly a little
5 reply or clarification. When I see that the
6 question is understood, I would tell you, and then
7 we go to another question and so on. Not like a
8 long list of questions where you can carve out
9 questions which would fall under your jurisdiction,
10 if I may say so, or something you would like to
11 answer more than another member of the team.

12 So, we may jump from a topic to another,
13 so it's not very easy to say tomorrow we are going
14 to address a number of questions but not those
15 which you would be the one answering. So, maybe we
16 can just work on the time frame which accommodates
17 your personal needs, and we certainly sympathize
18 with whatever needs you have and use the time
19 effectively.

20 So, maybe what I would like to do,
21 frankly, if we could have at the same time the
22 reply and surreply and the answer to the existing

1 questions in the morning, and there again you would
2 make your presentation and our presentation, then
3 we start asking questions in an interactive way,
4 and then we break altogether, unless Canfor wants
5 to proceed without you, Mr. Howse, we could do
6 that, and then resume the following morning. But
7 in that case, for sure we would need the following
8 morning, at least the morning, not tomorrow, but
9 the day after tomorrow.

10 MR. LANDRY: May I address that?

11 PRESIDENT GAILLARD: Please.

12 MR. LANDRY: From the claimant's
13 perspective--and I apologize for the U.S. in not
14 being able to have this discussion off the record
15 to be able to deal with that, but we have no
16 difficulty with that concept, to finish the reply
17 and surreply, which we would expect is not that
18 long, and to the questions that you have not dealt
19 with today by the end of tomorrow morning, and then
20 we would have no difficulty breaking until Thursday
21 morning to deal with the balance of the questions
22 so Professor Howse could be available on Thursday

1 morning.

2 PRESIDENT GAILLARD: Would that be all
3 right on the U.S. side? Of course, I must also
4 state that although we sympathize with your
5 personal needs, we also had reserved three days and
6 the parties have probably made arrangements to that
7 effect. I mean, having that in mind.

8 Mr. Clodfelter.

9 MR. CLODFELTER: Mr. President, if we
10 could have a few minutes off the record to speak
11 with counsel on the matter.

12 PRESIDENT GAILLARD: That's fine. Why
13 don't we break for five minutes. Tell us when you
14 are ready to resume.

15 (Brief recess.)

16 PRESIDENT GAILLARD: I go back to the
17 record for a second for everybody's concern,
18 including people in the other--if anyone is still
19 here--tomorrow we have decided to resume at 9:30.
20 We will hear the reply of the U.S., and then the
21 surreply of Canfor, and then we will have a series
22 of questions and answers during the course of the

1 day and, if need be, the following morning. And if
2 need be, we will give you some time to answer in
3 writing. If there are specific questions which
4 emerge which need further elaboration, we will see
5 when we get there.

6 Thank you very much. The hearing is
7 adjourned for the day, and we meet tomorrow at
8 9:30. Thank you.

9 (Whereupon, at 6:42 p.m., the hearing was
10 adjourned until 9:30 a.m. the following day.)

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1 CERTIFICATE OF REPORTER

2

3 I, David A. Kasdan, RDR-CRR, Court

4 Reporter, do hereby testify that the foregoing

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11 I further certify that I am neither

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15 of this litigation.

16

17 DAVID A. KASDAN, RDR-CRR

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